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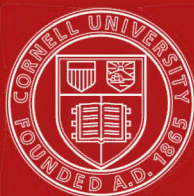
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A digest of the law of evidence /



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A DIGEST OF THE LAW OF EVIDENCE

BY THE LATE
SIR JAMES FITZJAMES STEPHEN, BART., K.C.S.I., D.C.L.
ONE OF THE JUDGES OF THE HIGH COURT OF JUSTICE

FROM THE FIFTH EDITION (1899) OF SIR HERBERT STEPHEN, BART., OF THE INNER TEM-
PLE, BARRISTER-AT-LAW, CLERK OF ASSIZE FOR THE NORTHERN CIRCUIT, AND
HARRY LUSHINGTON STEPHEN, OF THE INNER TEMPLE,
ESQUIRE, BARRISTER-AT-LAW.

WITH AMERICAN NOTES ESPECIALLY ADAPTED
TO THE NEW ENGLAND STATES.

BY
GEORGE E. BEERS
OF THE NEW HAVEN BAR; OF THE FACULTY OF THE YALE LAW SCHOOL; AUTHOR OF A
REVISION OF BALDWIN'S CONNECTICUT DIGEST.

HARTFORD, CONN
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1901

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AMERICAN PREFACE

Two objects have been in mind in the preparation of this work, first to furnish to the profession of all the States and to students an American edition of the last English edition of Stephen's great work published two years ago and second to prepare one especially adapted to the needs of New England lawyers.

As to the first, it is sufficient to say that the existing American editions are based upon the earlier English editions. The importance of the latest word of authors and courts is obvious.

As to the second, the jurisprudence of New England is, owing to racial and historical causes, a system, reasonably consistent with itself and diverging at many points from that of other sections.

By the system of references adopted the book is adapted to the needs of these two classes of readers. The text-books are general; the cases, while often leading cases the country over, are with few exceptions taken from the New England States.

For convenience, the decisions of the two States whose reported cases are most numerous — Massachusetts and Connecticut — have been placed by themselves.

The author's introduction, the various articles and the notes, both those at the foot of the pages and those at the

end, have been printed as they stand in the English edition, with the idea that the profession would prefer an authoritative text with American notes rather than an Americanized text, altered here and there to conform to what is believed to be American law. When it is remembered that each State is a law unto itself the impossibility of preparing a text which should be an authoritative statement of American law in anything like the same sense that the original is of English law is obvious.

While there has been an effort to have the citation of authorities full, no attempt has been made to make it exhaustive. Such a course would have quadrupled the bulk of the book and carried the editor entirely away from his plan of producing a hand-book for the office, study and court where the words of Stephen, a reference to an exhaustive treatise and selected cases from the reader's own jurisdiction, could be had in an instant.

The idea embodied in the book grew in part out of the author's own professional needs and in part out of the expressed wants of other lawyers and of judges, many of whom have in the past been in the habit of annotating Stephen with cases from the courts of their own State.

G. E. B.

New Haven, Conn., October 7, 1901.

PREFACE TO THE FIFTH EDITION

IN preparing the present edition of this work we have attempted to follow as closely as possible the principles on which it was originally written twenty-five years ago. We have had to deal with the two new Acts of importance—the Prevention of Cruelty to Children Act, 1894, and the Criminal Evidence Act, 1898. It is not possible to incorporate the provisions of the former Act, relating to the evidence of children too young to be sworn, with the corresponding parts of the Criminal Law Amendment Act, 1885; and the result is that Article 123A has to take the form of a confused exception to the general rule, which, in fact, correctly represents the present state of the law with which it deals. The Criminal Evidence Act, 1898, is, from a draftsman's point of view, a more satisfactory measure, but for practical purposes it is necessary to treat that also as an exception to a rule which has been abolished.

We have incorporated in this edition a few new cases, of which the most important is *R. v. Lillyman*, [1896], 2 Q. B. 167. Our view of the effect of this case has necessitated a long note (Note V., and cf. pp. 11, 12), which we hope may meet with the assent of the profession generally.

All writers of law books depend largely upon one another, and as this Digest was designed to consist of the

most succinct statement of principles possible, we are perhaps more than usually indebted to other authors and editors. We have spared no pains in taking the fullest advantage of the labours of Mr. Pitt-Lewis, in his last edition of 'Taylor on Evidence,' and of those of Mr. Phipson in the second edition of his most useful work. We are also under a special obligation to Mr. William Wills. He has most generously allowed us to appropriate bodily the Table published by him at the end of his 'Lectures on the Law of Evidence,' and we have accordingly reprinted it with a few slight alterations. [As it refers exclusively to English statutory law it is not reprinted in this edition.] Only those who have themselves tried to prepare such a table can realize how great is the labour involved in its construction; and, after having begun this task, and discovered that we could not improve upon Mr. Wills's work, we are only too glad to take advantage of his kindness and republish his Table, instead of constructing a new one of which his must necessarily have been the foundation.

The total bulk of this work has been increased from 228 to 271 pages since the last edition. As this is a considerable growth in so small a book, it may be well to state that the increase in the text is five pages, in the notes five pages, and in the index nine pages. Mr. Wills's Table takes up twenty-four pages.

H. S.

H. L. S.

June 25, 1899.

4, PAPER BUILDINGS, TEMPLE,

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[illegible]

INTRODUCTION

IN the years 1870-71 I drew what afterwards became the Indian Evidence Act (Act 1 of 1872). This act began by repealing (with a few exceptions) the whole of the Law of Evidence then in force in India, and proceeded to re-enact it in the form of a code of 167 sections, which has been in operation in India since Sept. 1872. I am informed that it is generally understood, and has required little judicial commentary or exposition.

In the autumn of 1872 Lord Coleridge (then Attorney-General) employed me to draw a similar code for England. I did so in the course of the winter, and we settled it in frequent consultations. It was ready to be introduced early in the Session of 1873. Lord Coleridge made various attempts to bring it forward, but he could not succeed till the very last day of the Session. He said a few words on the subject on the 5th August, 1873, just before Parliament was prorogued. The Bill was thus never made public, though I believe it was ordered to be printed.

It was drawn on the model of the Indian Evidence Act, and contained a complete system of law upon the subject of evidence.

The present work is founded upon this Bill, though it differs from it in various respects. Lord Coleridge's Bill proposed a variety of amendments of the existing law.

These are omitted in the present work, which is intended to represent the existing law exactly as it stands. The Bill, of course, was in the ordinary form of an Act of Parliament. In the book I have allowed myself more freedom of expression, though I have spared no pains to make my statements precise and complete.

In December, 1875, at the request of the Council of Legal Education, I undertook the duties of Professor of Common Law, at the Inns of Court, and I chose the Law of Evidence for the subject of my first course of lectures. It appeared to me that the draft Bill which I had prepared for Lord Coleridge supplied the materials for such a statement of the law as would enable students to obtain a precise and systematic acquaintance with it in a moderate space of time, and without a degree of labour disproportionate to its importance in relation to other branches of the law. No such work, so far as I know, exists; for all the existing books on the Law of Evidence are written on the usual model of English law-books, which, as a general rule, aim at being collections more or less complete of all the authorities upon a given subject to which a judge would listen in an argument in court. Such works often become, under the hands of successive editors, the repositories of an extraordinary amount of research, but they seem to me to have the effect of making the attainment by direct study of a real knowledge of the law, or of any branch of it as a whole, almost impossible. The enormous mass of detail and illustration which they contain, and the habit into which their writers naturally fall, of introducing into them everything which has any sort of connec-

tion, however remote, with the main subject, make these books useless for purposes of study, though they may increase their utility as works of reference. The enormous size and length of the standard works of reference is a proof of this. They consist of thousands of pages and refer to many thousand cases. When we remember that the Law of Evidence forms only one branch of the Law of Procedure, and that the Substantive Law which regulates rights and duties ought to be treated independently of it, it becomes obvious that if a lawyer is to have anything better than a familiarity with indexes, he must gain his knowledge in some other way than from existing books. No doubt such knowledge is to be gained. Experience gives by degrees, in favourable cases, a comprehensive acquaintance with the principles of the law with which a practitioner is conversant. He gets to see that it is shorter and simpler than it looks, and to understand that the innumerable cases which at first sight appear to constitute the law, are really no more than illustrations of a comparatively small number of principles; but those who have gained knowledge of this kind have usually no opportunity to impart it to others. Moreover, they acquire it very slowly, and with needless labour themselves, and though knowledge so acquired is often specially vivid and well remembered, it is often fragmentary, and the possession of it not unfrequently renders those who have it sceptical as to the possibility, and even as to the expediency, of producing anything more systematic and complete.

The circumstances already mentioned led me to put into a systematic form such knowledge of the subject as

I had acquired. This work is the result. The labour bestowed upon it has, I may say, been in an inverse ratio to its size.

My object in it has been to separate the subject of evidence from other branches of the law with which it has commonly been mixed up; to reduce it into a compact systematic form, distributed according to the natural division of the subject-matter; and to compress into precise definite rules, illustrated by examples, such cases and statutes as properly relate to the subject-matter so limited and arranged. I have attempted, in short, to make a digest of the law, which, if it were thought desirable, might be used in the preparation of a code, and which will, I hope, be useful, not only to professional students, but to every one who takes an intelligent interest in a part of the law of his country bearing directly on every kind of investigation into question of fact, as well as on every branch of litigation.

The Law of Evidence is composed of two elements, namely, first, an enormous number of cases, almost all of which have been decided in the course of the last 100 or 150 years, and which have already been collected and classified in various ways by a succession of text writers, from Gilbert and Peake to Taylor and Roscoe; secondly, a comparatively small number of Acts of Parliament which have been passed in the course of the last thirty or forty years, and have effected a highly beneficial revolution in the law as it was when it attracted the denunciations of Bentham. Writers on the Law of Evidence usually refer to statutes by the hundred, but the Acts of Parliament

which really relate to the subject are but few. A detailed account of this matter will be found at the end of the volume, in Note XLVIII.

The arrangement of this book is the same as that of the Indian Evidence Act, and is based upon the distinction between relevancy and proof, that is, between the question What facts may be proved? and the question How must a fact be proved assuming that proof of it may be given? The neglect of this distinction, which is concealed by the ambiguity of the word evidence (a word which sometimes means testimony and at other times relevancy), has thrown the whole subject into confusion, and has made what is really plain enough appear almost incomprehensible.

In my 'Introduction to the Indian Evidence Act' published in 1872, and in speeches made in the Indian Legislative Council, I enter fully upon this matter. It will be sufficient here to notice shortly the principle on which the arrangement of the subject is based, and the manner in which the book has been arranged in consequence.

The great bulk of the Law of Evidence consists of negative rules declaring what, as the expression runs, is not evidence.

The doctrine that all the facts in issue and relevant to the issue, and no others, may be proved, is the unexpressed principle which forms the centre of and gives unity to all these express negative rules. To me these rules always appeared to form a hopeless mass of confusion, which might be remembered by a great effort, but could not be understood as a whole, or reduced to a system, until it occurred to me to ask the question, What is this evidence which you

tell me hearsay is not? The expression "hearsay is not evidence" seemed to assume that I knew by the light of nature what evidence was, but I perceived at last that that was just what I did not know. I found that I was in the position of a person who, having never seen a cat, is instructed about them in this fashion: "Lions are not cats, nor are tigers nor leopards, though you might be inclined to think they were." Show me a cat to begin with, and I at once understand both what is meant by saying that a lion is not a cat, and why it is possible to call him one. Tell me what evidence is, and I shall be able to understand why you say that this and that class of facts are not evidence. The question, "What is evidence?" gradually disclosed the ambiguity of the word. To describe a matter of fact as "evidence" in the sense of testimony is obviously nonsense. No one wants to be told that hearsay, whatever else it is, is not testimony. What then does the phrase mean? The only possible answer is: It means that the one fact either is or else is not considered by the person using the expression to furnish a premiss or part of a premiss from which the existence of the other is a necessary or probable inference—in other words, that the one fact is or is not relevant to the other. When the inquiry is pushed further, and the nature of relevancy has to be considered in itself, and apart from legal rules about it, we are led to inductive logic, which shows that the judicial evidence is only one case of the general problem of science—namely, inferring the unknown from the known. As far as the logical theory of the matter is concerned, this is an ultimate answer. The logical theory was cleared up by Mr. Mill. Bentham and

some other ¹ writers had more or less discussed the connection of logic with the rules of evidence. But I am not aware that it occurred to any one before I published my 'Introduction to the Indian Evidence Act' to point out in detail the very close resemblance which exists between Mr. Mill's theory and the existing state of the law.

The law has been worked out by degrees by many generations of judges who perceived more or less distinctly the principle on which it ought to be founded. The rules established by them no doubt treat as relevant some facts which cannot perhaps be said to be so. More frequently they treat as irrelevant facts which are really relevant, but exceptions excepted, all their rules are reducible to the principle that facts in issue or relevant to the issue, and no others, may be proved.

The following outline of the contents of this work will show how in arranging it I have applied this principle.

All law may be divided into Substantive Law, by which rights, duties, and liabilities are defined, and the Law of Procedure, by which the Substantive Law is applied to particular cases.

The Law of Evidence is that part of the Law of Procedure which, with a view to ascertain individual rights and liabilities in particular cases, decides:

I. What facts may, and what may not be proven in such cases;

¹ See, *e. g.* that able and interesting book 'An Essay on Circumstantial Evidence,' by the late Mr. Wills, father of Mr. Justice Wills

Chief Baron Gilbert's work on the Law of Evidence is founded on Locke's 'Essay,' much as my work is founded on Mill's 'Logic.'

II. What sort of evidence must be given of a fact which may be proved;

III. By whom and in what manner the evidence must be produced by which any fact is to be proved.

I. The facts which may be proved are facts in issue, or facts relevant to the issue.

Facts in issue are those facts upon the existence of which the right or liability to be ascertained in the proceeding depends.

Facts relevant to the issue are facts from the existence of which inferences as to the existence of the facts in issue may be drawn.

A fact is relevant to another fact when the existence of the one can be shown to be the cause or one of the causes, or the effect or one of the effects, of the existence of the other, or when the existence of the one, either alone or together with other facts, renders the existence of the other highly probable, or improbable, according to the common course of events. *

Four classes of facts, which in common life would usually be regarded as falling within this definition of relevancy, are excluded from it by the Law of Evidence except in certain cases:

1. Facts similar to, but not specially connected with each other. (*Res inter alios actæ.*)

2. The fact that a person not called as a witness has asserted the existence of any fact. (*Hearsay.*)

3. The fact that any person is of opinion that a fact exists. (*Opinion.*)

* See Note I.

4. The fact that a person's character is such as to render conduct imputed to him probable or improbable. (*Character.*)

To each of those four exclusive rules there are, however, important exceptions, which are defined by the Law of Evidence.

II. As to the manner in which a fact in issue or relevant fact must be proved.

Some facts need not be proved at all, because the Court will take judicial notice of them, if they are relevant to the issue.

Every fact which requires proof must be proved either by oral or by documentary evidence.

Every fact, except (speaking generally) the contents of a document, must be proved by oral evidence. Oral evidence must in every case be direct, that is to say, it must consist of an assertion by the person who gives it that he directly perceived the fact to the existence of which he testifies.

Documentary evidence is either primary or secondary. Primary evidence is the document itself produced in court for inspection.

Secondary evidence varies according to the nature of the document. In the case of private documents a copy of the document, or an oral account of its contents, is secondary evidence. In the case of some public documents, examined or certified copies, or exemplifications, must or may be produced in the absence of the documents themselves.

Whenever any public or private transaction has been reduced to a documentary form, the document in which it

is recorded becomes exclusive evidence of that transaction, and its contents cannot, except in certain cases expressly defined, be varied by oral evidence, though secondary evidence may be given of the contents of the document.

III. As to the person by whom, and the manner in which the proof of a particular fact must be made.

When a fact is to be proved, evidence must be given of it by the person upon whom the burden of proving it is imposed, either by the nature of the issue or by any legal presumption, unless the fact is one which the party is estopped from proving by his own representations, or by his conduct, or by his relation to the opposite party.

The witnesses by whom a fact is to be proved must be competent. With very few exceptions, every one is now a competent witness in all cases. Competent witnesses, however, are not in all cases compelled or even permitted to testify.

The evidence must be given upon oath, or in certain excepted cases without oath. The witnesses must be first examined in chief, then cross-examined, and then re-examined. Their credit may be tested in certain ways, and the answers which they give to questions affecting their credit may be contradicted in certain cases and not in others.

This brief statement will show what I regard as constituting the Law of Evidence properly so called. My view of it excludes many things which are often regarded as forming part of it. The principal subjects thus omitted are as follows:—

I regard the question, What may be proved under particular issues? (which many writers treat as part of the Law

of Evidence) as belonging partly to the subject of pleading and partly to each of the different branches into which the Substantive Law may be divided.

A is indicted for murder, and pleads Not Guilty. This plea puts in issue, amongst other things, the presence of any state of mind describable as malice aforethought, and all matters of justification or extenuation.

Starkie and Roscoe treat these subjects at full length, as supplying answers to the question, What can be proved under an issue of Not Guilty on an indictment for murder? Mr. Taylor does not go so far as this; but a great part of his book is based upon a similar principle of classification. Thus chapters i. and ii. of Part II. are rather a treatise on pleading than a treatise on evidence.

Again, I have dealt very shortly with the whole subject of presumptions. My reason is that they also appear to me to belong to different branches of the Substantive Law, and to be unintelligible, except in connection with them. Take for instance the presumption that every one knows the law. The real meaning of this is that, speaking generally, ignorance of the law is not taken as an excuse for breaking it. This rule cannot be properly appreciated if it is treated as a part of the Law of Evidence. It belongs to the Criminal Law. In the same way numerous presumptions as to rights of property (in particular easements and incorporeal hereditaments) belong not to the Law of Evidence but to the Law of Real Property. The only presumptions which, in my opinion, ought to find a place in the Law of Evidence, are those which relate to facts merely as facts, and apart from the particular rights which they

constitute. Thus the rule, that a man not heard of for seven years is presumed to be dead, might be equally applicable to a dispute as to the validity of the marriage, an action of ejectment by a reversioner against a tenant *pur autre vie*, the admissibility of a declaration against interest, and many other subjects. After careful consideration, I have put a few presumptions of this kind into a chapter on the subject, and have passed over the rest as belonging to different branches of the Substantive Law.

Practice, again, appears to me to differ in kind from the Law of Evidence. The rules which point out the manner in which the attendance of witnesses is to be procured, evidence is to be taken on commission, depositions are to be authenticated and forwarded to the proper officers, interrogatories are to be administered, &c., have little to do with the general principles which regulate the relevancy and proof of matters of fact. Their proper place would be found in codes of civil and criminal procedure. I have, however, noticed a few of the most important of these matters.

A similar remark applies to a great mass of provisions as to the proof of certain particulars. Under the head of "Public Documents," Mr. Taylor gives amongst other things a list of all, or most, of the statutory provisions which render certificates or certified copies admissible in particular cases.

To take an illustration at random, section 1458 (6th ed., 1872), begins thus : "The registration of medical practitioners under the Medical Act of 1858, may be proved by a copy of the 'Medical Register,' for the time

being, purporting," &c. I do not wish for a moment to undervalue the practical utility of such information, or the industry displayed in collecting it ; but such provision as this appears to me to belong not to the Law of Evidence, but to the law relating to medical men. It is a matter rather for an index or schedule than for a legal treatise, intended to be studied, understood, and borne in mind in practice.

On several other points the distinction between the Law of Evidence and other branches of the law is more difficult to trace. For instance, the law of estoppel, and the law relating to the interpretation of written instruments, both run into the Law of Evidence. I have tried to draw the line in the case of estoppels by dealing with estoppels *in pais* only, to the exclusion of estoppels by deed and by matter of record, which must be pleaded as such ; and in regard to the law of written instruments by stating those rules only which seemed to me to bear directly on the question whether a document can be supplemented or explained by oral evidence.

The result is no doubt to make the statement of the law much shorter than is usual. I hope, however, that competent judges will find that, as far as it goes, the statement is both full and correct. As to brevity, I may say, in the words of Lord Mansfield :—"The law does not consist of particular cases, but of general principles which are illustrated and explained in those cases."¹

Every one will express somewhat differently the principles which he draws from a number of illustrations, and

¹ *R. v. Bembridge*, 1783, 3 Doug. 332.

this is one source of that quality of our law which those who dislike it describe as vagueness and uncertainty, and those who like it as elasticity. I dislike the quality in question, and I used to think that it would be an improvement if the law were once for all enacted in a distinct form by the Legislature, and were definitely altered from time to time as occasion required. For many years I did my utmost to get others to take the same view of the subject, but I am now convinced by experience that the unwillingness of the Legislature to undertake such an operation proceeds from a want of confidence in its power to deal with such subjects, which is neither unnatural nor unfounded. It would be as impossible to get in Parliament a really satisfactory discussion of a Bill codifying the Law of Evidence as to get a committee of the whole House to paint a picture. It would, I am equally well satisfied, be quite as difficult at present to get Parliament to delegate its powers to persons capable of exercising them properly. In the meanwhile the Courts can decide only upon cases as they actually occur, and generations may pass before a doubt is set at rest by a judicial decision expressly in point. Hence, if anything considerable is to be done towards the reduction of the law to a system, it must, at present at least, be done by private writers.

Legislation proper is under favourable conditions the best way of making the law ; but if that is not to be had, indirect legislation, the influence on the law of judges and legal writers, who deduce, from a mass of precedents, such principles and rules to appear to them to be suggested by the great bulk of the authorities, and to be in themselves rational and convenient, is very much better than none at

all. It has, indeed, special advantages, which this is not the place to insist upon. I do not think the law can be in a less creditable condition than that of an enormous mass of isolated decisions, and statutes assuming unstated principles; cases and statutes alike being accessible only by elaborate indexes. I insist upon this because I am well aware of the prejudice which exists against all attempts to state the law simply, and of the rooted belief which exists in the minds of many lawyers that all general propositions of law must be misleading and delusive, and that law books are useless except as indexes. An ancient maxim says, "*Omnis definitio in jure periculosa.*" Lord Coke wrote, "It is ever good to rely upon the books at large; for many times *compendia sunt dispendia*, and *Melius est petere fontes quam sectari rivulos.*" Mr. Smith chose this expression as the motto of his 'Leading Cases,' and the sentiment which it embodies has exercised immense influence over our law. It has not perhaps been sufficiently observed that when Coke wrote, the "books at large," namely the 'Year Books' and a very few more modern reports, contained probably about as much matter as two, or at most three, years of the reports published by the Council of Law Reporting; and that the *compendia* (such books, say, as Fitzherbert's 'Abridgment') were merely abridgments of the cases in the 'Year Books' classified in the roughest possible manner, and much inferior both in extent and arrangement to such a book as Fisher's 'Digest.'¹

In our own days it appears to me that the true *fontes*

¹ The 'Year Books' from 1307-1535, 228 years, would fill not more than twenty-five volumes of the 'Law Reports.'

are not to be found in reported cases, but in the rules and principles which such cases imply, and that the cases themselves are the *rivuli*, the following of which is a *dispendium*. My attempt in this work has been emphatically *petere fontes*, to reduce an important branch of the law to the are not to be found in reported cases, but in the rules and principles.

Should the undertaking be favourably received by the profession and the public, I hope to apply the same process to some other branches of the law; for the more I study and practise it, the more firmly am I convinced of the excellence of its substance and the defects of its form. Our earlier writers, from Coke to Blackstone, fell into the error of asserting the excellence of its substance in an exaggerated strain, whilst they showed much insensibility to defects, both of substance and form, which in their time were grievous and glaring. Bentham seems to me in many points to have fallen into the converse error. He was too keen and bitter a critic to recognise the substantial merits of the system which he attacked; and it is obvious to me that he had not that mastery of the law itself which is unattainable by mere theoretical study, even if the student is, as Bentham certainly was, a man of talent, approaching closely to genius.

During the last generation or more Bentham's influence has to some extent declined, partly because some of his books are like exploded shells, buried under the ruins which they have made, and partly because, under the influence of some of the most distinguished of living authors, great attention has been directed to legal history, and in particular to the study of Roman Law. It would be diffi-

cult to exaggerate the value of these studies, but their nature and use are liable to be misunderstood. This history of the Roman Law no doubt throws great light on the history of our own; and the comparison of the two great bodies of law, under one or the other of which the laws of the civilised world may be classified, cannot fail to be instructive; but the history of bygone institutions is valuable mainly because it enables us to understand, and so to improve, existing institutions. It would be a complete mistake to suppose either that the Roman Law is in substance wiser than our own, or that in point of arrangement and method the Institutes and the Digest are anything but warnings. The pseudo-philosophy of the Institutes, and the confusion of the Digest, are, to my mind, infinitely more objectionable than the absence of arrangement and of all general theories, good or bad, which distinguish the Law of England.

However this may be, I trust the present work will show that the Law of England on the subject to which it refers is full of sagacity and practical experience, and is capable of being thrown into a form at once plain, short, and systematic.

I wish, in conclusion, to direct attention to the manner in which I have dealt with such parts of the Statute Law as are embodied in this work. I have given, not the very words of the enactments referred to, but what I understand to be their effect, though in doing so I have deviated as little as possible from the actual words employed. I have done this in order to make it easier to study the subject as a whole. Every Act of Parliament which relates to the Law of Evidence assumes the existence of the unwritten

law. It cannot, therefore, be fully understood, nor can its relation to other parts of the law be appreciated, till the unwritten law has been written down so that the provisions of particular statutes may take their places as parts of it. When this is done, the Statute Law itself admits of, and even requires, very great abridgment. In many cases the result of a number of separate enactments may be stated in a line or two. For instance, the old Common Law as to the incompetency of certain classes of witnesses was removed by parts of six different Acts of Parliament—the net result of which is given in four short articles (106-109).

So, too, the doctrine of incompetency for peculiar or defective religious belief has been removed by many different enactments, the effect of which is shown in one article (123).

The various enactments relating to documentary evidence (see chap. x.) appear to me to become easy to follow and to appreciate when they are put in their proper places in a general scheme of the law, and arranged according to their subject-matter. By rejecting every part of an Act of Parliament except the actual operative words which constitute its addition to the law, and by setting it (so to speak) in a definite statement of the unwritten law of which it assumes the existence, it is possible to combine brevity with substantial accuracy and fulness of statement to an extent which would surprise those who are acquainted with Acts of Parliament only as they stand in the Statute Book.¹ At the same time I should warn any

¹ For a reference to statutes dealing strictly with evidence, see Note XLVIII., *post*.

one who may use this book for the purposes of actual practice in or out of court, that he would do well to refer to the very words of the statutes embodied in it. It is very possible that, in stating their effect instead of their actual words, I may have given in some particulars a mistaken view of their meaning.

Such are the means by which I have endeavoured to make a statement of the Law of Evidence which will enable not only students of law, but I hope any intelligent person who cares enough about the subject to study attentively what I have written, to obtain from it a knowledge of that subject at once comprehensive and exact—a knowledge which would enable him to follow in an intelligent manner the proceedings of Courts of Justice, and which would enable him to study cases and use text-books of the common kind with readiness and ease. I do not say more than this. I have not attempted to follow the matter out into its minute ramifications, and I have avoided reference to what after all are little more than matters of curiosity. I think, however, that any one who makes himself thoroughly acquainted with the contents of this book, will know fully and accurately all the leading principles and rules of evidence which occur in actual practice.

If I am entitled to generalise at all from my own experience, I think that even those who are already well acquainted with the subject will find that they understand the relations of its different parts, and therefore the parts themselves more completely than they otherwise would, by being enabled to take them in at one view, and to consider them in their relation to each other.

LIST OF ENGLISH ABBREVIATIONS

A. & E.	-	-	Adolphus & Ellis's Reports.
Atk.	-	- -	Atkyns's Reports.
B. & A.		-	Barnewall & Alderson's Reports.
B. & Ad.	-		Barnewall & Adolphus's Reports.
B. & B.			Broderip & Bingham's Reports.
B. & C.			Barnewall & Cresswell's Reports.
B. & P.	-		Bosanquet & Puller's Reports.
B. & S.	-	-	Best & Smith's Reports.
B. N. P.	-		Buller's Nisi Prius.
Beav.		-	Beavan's Reports.
Bell, C. C.			Bell's Crown Cases.
Best			Best on Evidence, 6th ed.
Bing.	-	-	Bingham's Reports.
Bing. N. C.			Bingham's New Cases.
Bligh			Bligh's Reports, House of Lords.
Br. P. C.	-	- -	Brown's Parliamentary Cases.
Buller, N. P.	-		Buller's Nisi Prius.
C. & F.	-	-	Clark & Finnelly's Reports.
C. & J.	-	-	Crompton & Jervis's Reports.
C. & Marsh.	-		Carrington & Marshman's Reports.
C. & P.	-		Carrington & Payne's Reports.
C. B.	-		Common Bench Reports.
C. B. (N. S.)			Common Bench Reports. New Series.
C. M. & R.	-	-	Crompton, Meeson, & Roscoe's Reports.
Camp.	-	-	Campbell's Reports.
Car. & Kir.			Carrington & Kirwan's Reports.
Coke	-	-	Coke's Reports.
Cowp.	-		Cowper's Reports.
Cox	-	-	Cox's Reports, Chancery.
Cox, C. C.			Cox's Criminal Cases.
D. (or Dears.) & B.			Dearsley & Bell's Crown Cases.
Dears., or	-	-	} Dearsley's Crown Cases.
Dearsley & P.	-	-	
De G. & J.	-	- -	De Gex & Jones's Reports.

De G. M. & G.		De Gex, Macnaghten, & Gordon's Bankruptcy Cases.
De G. & S.		De Gex & Smale's Reports.
Den. C. C.	-	Denison's Crown Cases.
Doug.		Douglas's Reports.
Dru. & War.	-	Drury & Warren's Reports.
E. & B.	- -	Ellis & Blackburn's Reports.
Ea.	- - -	East's Reports.
East, P. C.	- -	East's Pleas of the Crown.
Esp.	- - -	Espinasse's Reports.
Ex.	- - -	Exchequer Reports.
F. & F.	-	Foster & Finlason's Reports.
Gen. View Crim. Law		Stephen's General View of the Criminal Law.
Godbolt -		Godbolt's Reports, K. B.
H. & C.		Hurlstone & Coltman's Reports.
H. & N.		Hurlstone & Norman's Reports.
H. L. C.		House of Lords Cases.
Hale, P. C.		Hale's Pleas of the Crown.
Hare		Hare's Reports.
H. Bl.	-	H. Blackstone's Reports.
Ir. Cir. Rep.		Irish Circuit Reports.
Ir. Eq. Rep.	-	Irish Equity Reports.
Jac. & Wal.		Jacob & Walker's Reports.
Jebb, C. C.	-	Jebb's Crown Cases (Ireland).
K. & J.	- - -	Kay & Johnson's Reports.
Keen		Keen's Reports, Chancery.
L. & C.		Leigh & Cave's Crown Cases.
Leach	- -	Leach's Crown Cases.
M. & G.	- -	Manning & Granger's Reports.
M. & K.	-	Mylne & Keen's Reports.
M. & M.	- -	Moody & Malkin's Reports.
M. & R.		Moody & Ryan's Reports.
M. & S.	- -	Maule & Selwyn's Reports.
M. & W.	-	Meeson & Welsby's Reports.
Madd.	- -	Maddock's Reports.
Man. & Ry.	- - -	Manning & Ryland's Reports.

McNally Ev.	McNally's Rules of Evidence.
Moo. C. C.	Moody's Crown Cases.
Moo. P. C.	Moore's Privy Council Reports.
Mo. & Ro.	Moody & Robinson's Reports.
N. C.	- Bingham's New Cases.
Pea. R.	- - - Peake's Reports.
Phill.	Phillip's Reports.
Ph. Ev.	Phillips on Evidence, 10th ed.
Price	- - Price's Reports.
Q. B.	Queen's Bench Reports.
R. & R.	- Russell & Ryan's Crown Cases.
Rep.	- - - Coke's Reports.
R. N. P., or Roscoe, N. P.	- } Roscoe's Nisi Prius, 16th ed.
Russ. Cri.	- Russell on Crimes, 6th ed.
Russ. & Myl.	- Russell & Mylne's Reports, Chancery.
Selw. N. P.	- Selwyn's Nisi Prius.
Simon	Simons' Reports.
Sim. (N. S.)	Simons' Reports. New Series.
Sim. & Stu.	Simon & Stuart's Reports.
S. L. C., or Smith, L. C.	- } Smith's Leading Cases, 10th ed.
Star.	- Starkie's Reports.
Starkie, or Star. Ev.	- } Starkie on Evidence, 4th ed.
S. T., or St. Tri.	State Trials.
Swab. Ad.	Swabey's Admiralty Reports.
Sw. & Tr., or Swa. & Tri., or S. & T.	- } Swabey & Tristram's Reports, Probate and - } Divorce.
T. R.	- Term Reports.
T. E.	- Taylor on Evidence, 9th ed.
Tau.	- Taunton's Reports.
Ve.	- Vesey's Reports.
Vin. Abr.	- - Viner's Abridgment.
Wigram	- - - Wigram on Extrinsic Evidence.
Wills' Circ. Ev.	- Wills on Circumstantial Evidence.
Wils., or Wilson	- } Wilson's Reports.

A DIGEST
OF THE
LAW OF EVIDENCE.

A DIGEST
OF THE
LAW OF EVIDENCE.

PART I.
RELEVANCY.

CHAPTER I.

PRELIMINARY.

ARTICLE 1.*

DEFINITION OF TERMS.

IN this book the following words and expressions are used in the following senses, unless a different intention appears from the context.

“Judge” includes all persons authorised to take evidence, either by law or by the consent of the parties.

“Fact” includes the fact that any mental condition of which any person is conscious exists.

“Document” means any substance having any matter expressed or described upon it by marks capable of being read.

* See Note I.

“Evidence” means —

(1) Statements made by witnesses in court under a legal sanction, in relation to matters of fact under inquiry;

such statements are called oral evidence:

(2) Documents produced for the inspection of the Court or judge;

such documents are called documentary evidence:

“Conclusive Proof” means evidence upon the production of which, or a fact upon the proof of which, the judge is bound by law to regard some fact as proved, and to exclude evidence intended to disprove it.

“A presumption” means a rule of law that Courts and judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved.

The expression “facts in issue” means —

(1) All facts which, by the form of the pleadings in any action, are affirmed on one side and denied on the other:

(2) In actions in which there are no pleadings, or in which the form of the pleadings is such that distinct issues are not joined between the parties, all facts from the establishment of which the existence, non-existence, nature, or extent of any right, liability, or disability asserted or denied in any such case would by law follow.

The word “relevant” means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other.

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), secs. 1, 14, 15, 33, 44, 49, 50; 1 Taylor on Evidence (Chamberlayne's 9th ed.), secs. 1, 70, 71, 109, 110, p. 2183.

"Evidence" defined.—Mr. Thayer defines the term evidence as "any matter of fact which is furnished to a legal tribunal," regarding the definition of the text as too narrow in that it excludes matters of fact demonstrated to the senses of the judge, as where a coat is put on in court to show its fit. Cases on Evidence, p. 2.

Mental condition.—Mental condition is to be established as a fact. *Wheelden v. Wilson*, 44 Me. 1.

Test of relevancy.—"The law furnishes no test of relevancy. For this it tacitly refers to logic and general experience,—assuming that the principles of reasoning are known to its judges and ministers, just as a vast multitude of other things are assumed as already sufficiently known to them." Thayer's Preliminary Treatise on Evidence, p. 265.

Collateral facts.—Irrelevant facts are sometimes called "collateral facts." 1 Greenleaf on Evidence (15th ed.), sec. 52, adopted in *Eaton v. Telegraph Co.*, 68 Me. 67.

Illustrations of relevant facts.—Upon the question as to whether a sale was in fraud of creditors, the declaration of the purchaser that he was not in condition to pay anything for the goods, is relevant. *Dale v. Gower*, 24 Me. (11 Shep.) 533. See also *Trull v. True*, 33 Me. 367.

Testimony as to the management and speed of an engine at a crossing is relevant upon the question of the management and speed, about a minute later, at a crossing three-quarters of a mile distant. *Lyman v. Boston & Maine R. R. Co.*, 66 N. H. 200; 11 L. R. A. 367.

In an action against a railroad company, for closing a street on which the plaintiff owned a lot, evidence of the amount of travel passing over the street is relevant. *Johnston v. Old Colony R. R. Co.*, 18 R. I. 642; 29 Atl. 594.

Testimony that a wife attended to all her husband's business is relevant on the question of her agency in a particular transaction. *Sanborn v. Cole*, 63 Vt. 590; 14 L. R. A. 210.

CONNECTICUT.

Mental condition.—"The existence of a mental state, such as an apprehension of fear under certain circumstances, is a fact, to be

proved, like every other fact, by the best evidence of which the nature of the case admits." *State v. Lee*, 69 Conn. 197.

"Presumption" defined.— "The term 'presumption' is used to signify that which may be assumed without proof, or taken for granted." *Ward v. Metropolitan Life Ins. Co.*, 66 Conn. 238.

"A presumption, or a probability — for in this connection these words mean the same thing — is an inference as to the existence or non-existence of one fact from the existence or non-existence of some other fact, founded on a previous experience of that connection. *Fay v. Reynolds*, 60 Conn. 220.

It is to be noted that the author used the word "presumption" as referring to disputable presumptions of law only and treats "conclusive presumptions" under "conclusive proof." Presumptions of fact form no part of the law of evidence. They have "simply the force of an argument." *Ward v. Metropolitan Life Ins. Co.*, 66 Conn. 239 (citing *Stephen's Digest*).

Issues.— The question as to what the issues are is for the court and cannot be left to the jury. *Avon Mfg. Co. v. Andrews*, 30 Conn. 488.

"Relevant" defined.— The definition of "relevant" of the text is adopted substantially in *Plumb v. Curtis*, 66 Conn. 166; *State v. Blake*, 69 Conn. 76, both of which cite *Stephen's Digest*.

Replying to irrelevant evidence.— If irrelevant evidence is admitted in a criminal prosecution, evidence to rebut it is admissible, and it will be no ground for review that the rebutting evidence was irrelevant. *Barnes v. State*, 20 Conn. 257.

If irrelevant testimony is admitted in favor of one party and against the objection of the other, the former cannot complain if the latter is afterwards permitted to introduce like testimony in contradiction. *Budd v. Meriden Electric R. R. Co.*, 69 Conn. 272.

Illustrations of relevant facts.— Where the plaintiff claims that a car was late and was running fast to make up time, evidence that the car was running rapidly before it reached the scene of the accident is relevant. *Laufer v. Bridgeport Traction Co.*, 68 Conn. 485.

Evidence that an elderly person had ulcers and varicose veins upon one limb in 1892, and that the latter disease ordinarily continued through life and increased, is relevant to show the condition of that limb in 1893. *Sturdevant's Appeal*, 71 Conn. 396.

To fix the date of an event in dispute, it is within the discretionary power of the court to admit evidence of the date of another prior event, not in dispute; and for this purpose to allow the introduction

of a written instrument bearing the latter date, with evidence that such date was correct. *Harris v. Rosenberg*, 43 Conn. 230, 231.

Where the question was whether a physician's practice was a legitimate and regular one, it was held that evidence of specific acts of irregular practice on the part of the defendant, such as procuring abortions, etc., was admissible to show that his practice was illegitimate. *Bradbury v. Bardin*, 35 Conn. 583.

That an employer paid for the board of some of his employees at various places, and that such was his general custom, is relevant upon the issue of whether he is liable for the board of a particular employee at a particular place. *Dwight v. Brown*, 9 Conn. 89

Where evidence is offered that one is in a certain place where a trespass was committed, in order to connect him with the trespass, it is competent to show that he was there for another purpose. *Prindle v. Glover*, 4 Conn. 269.

To prove that a person was intoxicated at a certain time, evidence is not admissible that he had been drinking a quantity of spirituous liquors shortly before that time. *Tuttle v. Russell*, 2 Day, 201.

MASSACHUSETTS.

Mental condition.—Where mental condition is in issue, evidence of condition before and after the time in question, if not too remote, is relevant. *White v. Graves*, 107 Mass. 325.

Evidence presented to senses of judge.—An instance of evidence not included in the definition of the text, but embraced by Mr. Thayer's definition quoted in the note to this article, occurs in *Brown v. Foster*, 113 Mass. 137, where, in a controversy over the fit of a coat, the coat is put on.

Replying to irrelevant evidence.—In Massachusetts the question of whether a party may offer evidence in reply to irrelevant evidence is addressed to the discretion of the judge. *Brooks v. Acton*, 117 Mass. 204.

Illustrations of relevant facts.—Evidence of extravagance is relevant in connection with other evidence in an embezzlement case. *Hackett v. King*, 8 Allen, 144.

Upon the issue of fraud on the part of a grantee in misdescribing land in a deed, the acts of the grantor in the way of making a plan of the land is admissible. *Walker v. Swasey*, 4 Allen, 527.

Evidence that the complainant in bastardy proceedings associated with men of loose character is not relevant on the issue of the paternity of the child. *Eddy v. Gray*, 4 Allen, 435.

CHAPTER II.

OF FACTS IN ISSUE AND RELEVANT TO THE ISSUE.

ARTICLE 2.*

FACTS IN ISSUE AND FACTS RELEVANT TO THE ISSUE
MAY BE PROVED.

EVIDENCE may be given in any proceeding of any fact in issue,

and of any fact relevant to any fact in issue unless it is hereinafter declared to be deemed to be irrelevant,

and of any fact hereinafter declared to be deemed to be relevant to the issue, whether it is or is not relevant thereto.

Provided that the judge may exclude evidence of facts which, though relevant or deemed to be relevant to the issue, appear to him too remote to be material under all the circumstances of the case.

Illustration.

(a) A is indicted for the murder of B, and pleads not guilty.

The following facts may be in issue:—The fact that A killed B; the fact that at the time when A killed B he was prevented by disease from knowing right from wrong; the fact that A had received from B such provocation as would reduce A's offence to manslaughter.

The fact that A was at a distant place at the time of the murder would be relevant to the issue; the fact that A had a good character would be deemed to be relevant; the fact that C on his deathbed declared that C and not A murdered B would be deemed not to be relevant.

* See Note II.

AMERICAN NOTE.

GENERAL.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 49-55; McKelvey on Evidence, p. 126 *et seq.*; Thayer's Preliminary Treatise on Evidence, pp. 265, 266; *Trull v. True*, 33 Me. 367.

"Unless excluded by some rule or principle of law, all that is logically probative is admissible." Thayer's Preliminary Treatise on Evidence, p. 265.

CONNECTICUT.

"No precise and universal test of relevancy is furnished by the law. The question must be determined in each case according to the teachings of reason and judicial experience. Thayer's Cases on Evidence, pp. 2, 3. If the evidence conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury. *Ins. Co. v. Weide*, 11 Wall. 438, 440." *Plumb v. Curtiss*, 66 Conn. 166.

All relevant facts are admissible unless it is affirmatively shown that they are excluded by some rule of law.

"Evidence is admitted not because it is shown to be competent, but because it is not shown to be incompetent." *Plumb v. Curtis*, 66 Conn. 166.

"The question as to its admission or rejection [the admission or rejection of evidence] addresses itself to the court as one to be answered with a view to practical rather than theoretical considerations." *Plumb v. Curtis*, 66 Conn. 166.

Courts are not to rule out testimony which is relevant to any point in the plaintiff's case, because he may not have sufficient proof to establish the other points. *Bartlett v. Evarts*, 8 Conn. 527.

Evidence, in itself inadmissible, may be rendered admissible by being offered in connection with other evidence which is admissible. *Gage v. Smith*, 27 Conn. 75.

Where certain evidence not by itself relevant or admissible is offered by a party claiming in good faith that he shall follow it up by introducing other evidence which will make it relevant, the court may admit it, subject to objection, but should direct the jury to disregard it, in case the other evidence promised is not produced. *Moppin v. Aetna Axle & Spring Co.*, 41 Conn. 34.

Evidence pertinent to support the allegations is admissible, on a plea of the general issue, without respect to the question whether it

is sufficient to support the action. *North Ecclesiastical Society v. Matson*, 36 Conn. 35.

Evidence, to be admissible, need not afford full proof of the fact to establish which it is offered. It is enough if it tends to prove it,—if it proves a single circumstance from which such fact may fairly be presumed. *Belden v. Lamb*, 17 Conn. 450.

MASSACHUSETTS.

If evidence is of facts too remote to be material, the judge may exclude it. *White v. Graves*, 107 Mass. 325.

ARTICLE 3.

RELEVANCY OF FACTS FORMING PART OF THE SAME TRANSACTION AS THE FACTS IN ISSUE.

A transaction is a group of facts so connected together as to be referred to by a single legal name, as a crime, a contract, a wrong or any other subject of inquiry which may be in issue.

Every fact which is part of the same transaction as the facts in issue is deemed to be relevant to the facts in issue, although it may not be actually in issue, and although if it were not part of the same transaction it might be excluded as hearsay.

Whether any particular fact is or is not part of the same transaction as the facts in issue is a question of law upon which no principle has been stated by authority and on which single judges have given different decisions.

When a question as to the ownership of land depends on the application to it of a particular presumption capable of being rebutted, the fact that it does not apply to other

neighbouring pieces of land similarly situated is deemed to be relevant.

Illustrations.

(a) The question was, whether A murdered B by shooting him.

The fact that a witness in the room with B when he was shot, saw a man with a gun in his hand pass a window opening into the room in which B was shot, and thereupon exclaimed, "There's butcher!" (a name by which A was known), was allowed to be proved by Lord Campbell, L. C. J.¹

¹ *R. v. Fowkes*, Leicester Spring Assizes, 1856. Ex relatione O'Brien, Serjt.

In the report of this case in the *Times* for March 8, 1856, the evidence of the witnesses on this point is thus given:—

"*William Fowkes*: My father got up [? went to] the window, and opened it and shoved the shutter back. He waited there about three minutes. It was moonlight, the moon about the full. He closed the window but not the shutter. My father was returning to the sofa when I heard a crash at the window. I turned to look and hooted, 'There's butcher.' I saw his face at the window, but did not see him plain. He was standing still outside. I aren't able to tell who it was, not certainly. I could not tell his size. While I was hooting the gun went off. I hooted very loud. He was close to the shutter or thereabouts. It was only open about eight inches. *Lord Campbell*: Did you see the face of the man? *Witness*: Yes, it was moonlight at the time. I have a belief that it was the butcher. I believe it was. I now believe it from what I then saw. I heard the gun go off when he went away. We heard him run by the window through the garden towards the park."

Upon cross-examination the witness said that he saw the face when he hooted and heard the report at the same moment. The report adds, "The statement of this witness was confirmed by Cooper, the policeman (who was in the room at the time) except that Cooper saw nothing when William Fowkes hooted, 'There's butcher at the window!'" He stated he had not time to look before the gun went off. In this case the evidence as to W. Fowkes's statement could not be admissible on the ground that what he said was in the prisoner's presence, as the window was shut when he spoke. It is also obvious that the fact that he said at the time "There's butcher" was far

(b) The question was, whether A cut B's throat, or whether B cut it herself.

A statement made by B when running out of the room in which her throat was cut immediately after it had been cut was not allowed to be proved by Cockburn, L. C. J.²

(c) The question was, whether A was guilty of the manslaughter of B by carelessly driving over him.

A statement made by B as to the cause of his accident as soon as he was picked up was allowed to be proved by Park, J., Gurney, B., and Patteson, J., though it was not a dying declaration within article 26.³

(d) The question is, whether A the owner of one side of a river owns the entire bed of it or only half the bed at a particular spot. The fact that he owns the entire bed a little lower down than the spot in question is deemed to be relevant.⁴

(e) The question is, whether a piece of land by the roadside belongs to the lord of the manor or to the owner of the adjacent land. The fact that the lord of the manor owned other parts of the slip of land by the side of the same road is deemed to be relevant.⁵

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), sec. 108; McKelvey on Evidence, p. 277 *et seq.*

A transaction is not ended so long as the parties to it remain together, and anything, according to the usual course of proceeding, remains to be done. *Fifield v. Richardson*, 34 Vt. 410.

A mere narration of past events, even though made soon after the transaction, is not admissible. *Knox v. Wheelock*, 54 Vt. 150.

more likely to impress the jury than the fact that he was at the trial uncertain whether the person he saw was the butcher, though he was disposed to think so.

² *R. v. Bedingfield*, Suffolk Assizes, 1879, 14 Cox C. C. 341. The propriety of this decision was the subject of two pamphlets, one by W. Pitt Taylor, who denied, the other by the Lord Chief Justice, who maintained it.

³ *R. v. Foster*, 1834, 6 C. & P. 325.

⁴ *Jones v. Williams*, 1837, 2 M. & W. 326.

⁵ *Doe v. Kemp*, 1831, 7 Bing. 332; 2 Bing. N. C. 102.

In a suit against a municipal corporation to recover damages for the obstruction of a way by digging, it may be proved as part of the *res gestæ*, for whom those doing the work claimed to be working. *Wiley v. Portsmouth*, 64 N. H. 214; 9 Atl. 220.

CONNECTICUT.

The rule of the text is included under the rule that *res gestæ* are admissible, that term being defined as "the circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character." *Stirling v. Buckingham*, 46 Conn. 464, adopted in *Pinney v. Jones*, 64 Conn. 55, and *Norwalk v. Ireland*, 68 Conn. 14.

In determining the meaning of a deed, another deed, executed at the same time, between the same parties and relating to the same subject-matter, is admissible on the theory that the two form parts of one agreement. *Simonds v. Shields*, 72 Conn. 146.

A mere narrative of past events, even though made soon after the transaction, is not admissible. *Rowland v. Phila., W. & B. R. R. Co.*, 63 Conn. 419.

In an action against a steamboat company, for personal injuries, the plaintiff may show that after he was taken from the water the captain treated him in an inhuman manner. "It was competent for the plaintiff to prove the whole transaction." *Hall v. Conn. River Steamboat Co.*, 13 Conn. 325. See also *Thomas v. Beck*, 39 Conn. 241.

MASSACHUSETTS.

Authorities.—*Com. v. Hackett*, 2 Allen, 136; *Haynes v. Rutter*, 24 Pick. 242; *Com. v. McPike*, 3 Cush. 181.

A mere narrative of past events, even though made soon after the transaction, is not admissible. *Haynes v. Rutter*, 24 Pick. 242; *Lane v. Bryant*, 9 Gray, 245; *Eastman v. B. & M. R. R. Co.*, 165 Mass. 342.

ARTICLE 4.*

ACTS OF CONSPIRATORS.

When two or more persons conspire together to commit any offence or actionable wrong, everything said, done, or

* See Note III.

written by any one of them in the execution or furtherance of their common purpose, is deemed to be so said, done, or written by every one, and is deemed to be a relevant fact as against each of them; but statements made by individual conspirators as to measures taken in the execution or furtherance of any such common purpose are not deemed to be relevant as such as against any conspirators, except those by whom or in whose presence such statements are made. Evidence of acts or statements deemed to be relevant under this article may not be given until the judge is satisfied that, apart from them, there are *primâ facie* grounds for believing in the existence of the conspiracy to which they relate.

Illustrations.

(a) The question is, whether A and B conspired together to cause certain imported goods to be passed through the custom-house on payment of too small an amount of duty.

The fact that A made in a book a false entry, necessary to be made in that book in order to carry out the fraud, is deemed to be a relevant fact as against B.

The fact that A made an entry on the counterfoil of his cheque-book showing that he had shared the proceeds of the fraud with B, is deemed not to be a relevant fact as against B.⁶

(b) The question is, whether A committed high treason by imagining the king's death; the overt act charged is that he presided over an organised political agitation calculated to produce a rebellion, and directed by a central committee through local committees.

The facts that meetings were held, speeches delivered, and papers circulated in different parts of the country, in a manner likely to produce rebellion by and by the direction of persons shown to have acted in concert with A, are deemed to be relevant facts as against A, though he was not present at those transactions, and took no part in them personally.

⁶ *R. v. Blake*, 1844, 6 Q. B. 126.

. An account given by one of the conspirators in a letter to a friend, of his own proceedings in the matter, not intended to further the common object, and not brought to A's notice, is deemed not to be relevant as against A.⁷

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), sec. 111; McKelvey on Evidence, p. 108.

Authorities on the first paragraph of the text.—*State v. Soper*, 16 Me. 293; 33 Am. Dec. 665; *Aldrich v. Warren*, 16 Me. 465; *Lee v. Lamprey*, 43 N. H. 13; *Jacobs v. Shorey*, 48 N. H. 100; 97 Am. Dec. 586; *Jeune v. Joslyn*, 41 Vt. 478.

The evidence described in this article comes in as part of the *res gestæ*. *State v. Soper*, 16 Me. 293; 33 Am. Dec. 665.

The rule of the text as to statements made subsequently by individual conspirators, as to measures taken, is supported by *State v. Larkin*, 49 N. H. 39.

CONNECTICUT.

Authorities on the first statement of the text.—*Cowles v. Coe*, 21 Conn. 235; *State v. Glidden*, 55 Conn. 78, 79; *Knower v. Cadden Clothing Co.*, 57 Conn. 222; *State v. Thompson*, 69 Conn. 720; *State v. Shields*, 45 Conn. 263.

The rule of this article applies to both civil and criminal cases. *Knower v. Cadden Clothing Co.*, 57 Conn. 222.

The things must have been said, done or written in the execution or furtherance of the common purpose. *Knower v. Cadden Clothing Co.*, 57 Conn. 222.

Everything *said* under the circumstances detailed in the text is admissible. *Cowles v. Coe*, 21 Conn. 234.

It is immaterial that the one whose acts or declarations are offered is not a party to the proceeding. *State v. Glidden*, 55 Conn. 78; 8 Atl. 890; 3 Am. St. Rep. 23.

Statements of one are admissible even though made in the absence of the others. *State v. Shields*, 45 Conn. 256; *Knower v. Cadden Clothing Co.*, 57 Conn. 222.

Preliminary proof.—The rule of the text as to preliminary proof of the conspiracy is supported by *Knower v. Cadden Clothing Co.*, 57 Conn. 222.

⁷ *R. v. Hardy*, 1794, 24 S. T. *passim*, but see particularly 451-3.

The existence of the common purpose is primarily to be passed upon by the court, for the purpose of deciding on the admissibility of the evidence, but is ultimately for the jury. *State v. Thompson*, 69 Conn. 729.

The court must be satisfied that there is sufficient evidence to warrant the jury in finding a combination. *Cowles v. Coe*, 21 Conn. 234; *Knower v. Cadden Clothing Co.*, 57 Conn. 223; *State v. Thompson*, 69 Conn. 720.

MASSACHUSETTS.

Authorities.—*Com. v. Tivnon*, 8 Gray, 375; 69 Am. Dec. 248; *Com. v. Scott*, 123 Mass. 235; 25 Am. Rep. 81; *Com. v. Smith*, 151 Mass. 491; *Com. v. Crowninshield*, 10 Pick. 497; *Com. v. Brown*, 14 Gray, 419; *Com. v. Waterman*, 122 Mass. 43.

Conversations between A and B, during the pendency of the criminal enterprise, although after the doing of the act which the parties conspired to commit, is admissible against C, the other conspirator, in a trial for conspiracy. *Com. v. Smith*, 151 Mass. 491. See also *Com. v. Crowninshield*, 10 Pick. 497; *Com. v. Brown*, 14 Gray, 419; *Com. v. Waterman*, 122 Mass. 43.

Acts done after the purpose of the conspiracy has been accomplished may be admissible. *Com. v. Scott*, 123 Mass. 235; 25 Am. Rep. 81.

Subsequent statements.—The rule of the text as to statements made subsequently by individual conspirators, as to the measures taken, is supported by *Com. v. Ingrahan*, 7 Gray, 46.

Preliminary proof.—The existence of the common purpose is primarily to be passed upon by the court, for the purpose of deciding on the admissibility of the evidence, but is ultimately for the jury. *Com. v. Brown*, 14 Gray, 419.

ARTICLE 5.*

TITLE.

When the existence of any right of property, or of any right over property is in question, every fact which constitutes the title of the person claiming the right, or which shows that he, or any person through whom he claims, was

* See Note IV.; see also Article 88 as to the proof of ancient deeds.

in possession of the property, and every fact which constitutes an exercise of the right, or which shows that its exercise was disputed, or which is inconsistent with its existence or renders its existence improbable, is deemed to be relevant.

Illustrations.

(a) The question is, whether A has a right of fishery in a river.

An ancient *inquisitio post mortem* finding the existence of a right of fishery in A's ancestors, licenses to fish granted by his ancestors, and the fact that the licensees fished under them, are deemed to be relevant.⁸

(b) The question is, whether A owns land.

The fact that A's ancestors granted leases of it is deemed to be relevant.⁹

(c) the question is, whether there is a public right of way over A's land.

The facts that persons were in the habit of using the way, that they were turned back, that the road was stopped up, that the road was repaired at the public expense, and A's title-deeds showing that for a length of time, reaching beyond the time when the road was said to have been used, no one had power to dedicate it to the public, are all deemed to be relevant.¹⁰

(d) The question is, whether A has a several fishery in a river. The proceedings in a possessory suit in the Irish Court of Chancery by the plaintiff's predecessor in title, and a decree in that suit quieting the plaintiff's predecessor in his title, is relevant, as showing possession and enjoyment of the fishery at the time of the suit.¹¹

⁸ *Rogers v. Allen*, 1808, 1 Camp. 309.

⁹ *Doe v. Pulman*, 1842, 3 Q. B. 622, 623, 626 (citing *Duke of Bedford v. Lopes*). The document produced to show the lease was a counterpart signed by the lessee. See *post*, art. 64.

¹⁰ Common practice. As to the title-deeds, *Brough v. Lord Scarsdale*, Derby Summer Assizes, 1865. In this case it was shown by a series of family settlements that for more than a century no one had had a legal right to dedicate a certain footpath to the public.

¹¹ *Neill v. Duke of Devonshire*, 1882, L. R. 8 App. p. 135, and see especially p. 147.

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), secs. 34, 53a; 1 Taylor on Evidence (Chamberlayne's 9th ed.), sec. 123; Abbott's Trial Evidence (2d ed.), p. 873.

Evidence of the character indicated in the text is admissible as a part of the *res gestæ*. *Harriman v. Hill*, 14 Me. 127.

On questions of title, declarations explanatory of acts of possession, and in disparagement of title, are admissible. *Parker v. Marston*, 34 Me. 386; *Bennett v. Camp*, 54 Vt. 36; *Hobbs v. Cram*, 22 N. H. 130.

CONNECTICUT.

The fact of executing a chattel mortgage may thus be shown. *Chillingworth v. Eastern Tinware Co.*, 66 Conn. 313.

Statements, by one in possession of property, to the effect that it was his, and the fact that he offered to sell it, and repaired it at his own expense, are admissible on the question of title, being acts "while he was in the possession of it, which naturally and usually flow from and accompany the ownership of personal property." *Avery v. Clemens*, 18 Conn. 309.

Mere declarations in favor of title, not explanatory of any act by one in possession, are not admissible. *Smith v. Martin*, 17 Conn. 401.

MASSACHUSETTS.

Authorities.—*Boston v. Richardson*, 105 Mass. 351; *Gloucester v. Gaffney*, 8 Allen, 11; *Berry v. Raddin*, 11 Allen, 577; *Osgood v. Coates*, 1 Allen, 77.

Mere declarations in favor of title, not explanatory of any act by one in possession, are not admissible. *Morrill v. Titcomb*, 8 Allen, 100; *Osgood v. Coates*, 1 Allen, 77.

ARTICLE 6.

When the existence of any custom is in question, every fact is deemed to be relevant which shows how, in particular instances, the custom was understood and acted upon by the parties then interested.

Illustrations.

(a) The question is, whether, by the custom of borough-English as prevailing in the manor of C, A is heir to B.

The fact that other persons, being tenants of the manor, inherited from ancestors standing in the same or similar relations to them as that in which A stood to B, is deemed to be relevant.¹²

(b) The question was, whether by the custom of the country a tenant-farmer not prohibited by his lease from doing so might pick and sell surface flints, minerals being reserved by his lease. The fact that under similar provisions in leases of neighbouring farms flints were taken and sold is deemed to be relevant.¹³

AMERICAN NOTE.

GENERAL.

Authorities.—2 Greenleaf on Evidence (15th ed.), sec. 252; *Knowles v. Dow*, 22 N. H. 387, 403, 55 Am. Dec. 163. But see 27 Am. & Eng. Encyclopædia of Law (1st ed.), p. 738.

CONNECTICUT.

To prove that a note executed by C, as treasurer of a town, was the note of the town,—Held, that evidence was admissible of votes passed by the town, from time to time, during a long period of years, authorizing its treasurers to borrow money, for the use of the town, and that the treasurers, under such votes, had generally given notes for the money borrowed, similar in form to that in question, which had always been paid by the town, by which also the treasurers' reports, mentioning these bonds, had always been accepted. *Bank of New Milford v. New Milford*, 36 Conn. 100.

¹² *Muggleton v. Barnett*, 1856, 1 H. & N. 282; and see *Johnstone v. Lord Spencer*, 1885, 30 Ch. Div. 581. It was held in this case that a custom might be shown by uniform practice which was not mentioned in any custumal Court roll or other record. For cases of evidence of a custom of trade, see *Ex parte Powell, in re Mathews*, 1875, 1 Ch. D. 501; and *Ex parte Turquand, in re Parker*, 1885, 14 Q. B. D. 636. See too the Notes on *Wigglesworth and Dallison*, in 1 Smith's Leading Cases.

¹³ *Tucker v. Linger*, 1882, L. R. 21 Ch. Div. 18; and see p. 37.

The purchaser of a cemetery lot from the person who laid out the cemetery received a deed, from the language of which it was uncertain whether a title to the adjoining alleys passed or not. Held, that evidence was admissible in favor of the grantor that it was the custom in other cemeteries, both in the same town and elsewhere, for the original proprietors to have and retain the right of control, etc., over the alleys. *Seymour v. Page*, 33 Conn. 66.

MASSACHUSETTS.

Authorities.—*First Nat. Bank v. Goodsell*, 107 Mass. 149; *Morse v. Woodworth*, 155 Mass. 233, 29 N. E. 525.

ARTICLE 7.

MOTIVE, PREPARATION, SUBSEQUENT CONDUCT, EXPLANATORY STATEMENTS.

When there is a question whether any act was done by any person, the following facts are deemed to be relevant, that is to say —

any fact which supplies a motive for such an act, or which constitutes preparation for it;¹⁴

any subsequent conduct of such person apparently influenced by the doing of the act, and any act done in consequence of it by or by the authority of that person.¹⁵

Illustrations.

(a) The question is, whether A murdered B.

The facts that, at the instigation of A, B murdered C twenty-five years before B's murder, and that A at or before that time used expressions showing malice against C, are deemed to be relevant as showing a motive on A's part to murder B.¹⁶

¹⁴ Illustrations (a) and (b).

¹⁵ Illustrations (c) (d) and (e).

¹⁶ *R. v. Clewes*, 1830, 4 C. & P. 221.

(b) The question is, whether A committed a crime.

The fact that A procured the instruments with which the crime was committed is deemed to be relevant.¹⁷

(c) A is accused of a crime.

The facts that, either before or at the time of, or after the alleged crime, A caused circumstances to exist tending to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed things or papers, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence, are deemed to be relevant.¹⁸

(d) The question is, whether A committed a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, and the manner in which he conducted himself when statements on the subject were made in his presence and hearing, are deemed to be relevant.¹⁹

(e) The question is, whether A suffered damage in a railway accident.

The fact that A conspired with B, C, and D to suborn false witnesses in support of his case is deemed to be relevant,²⁰ as conduct subsequent to a fact in issue tending to show that it had not happened.

AMERICAN NOTE.

GENERAL.

Authorities.—Underhill on Evidence, sec. 9; McKelvey on Evidence, p. 146; 11 Am. & Eng. Encyclopædia of Law (2d ed.), p. 503 *et seq.*

Motive.—Facts supplying a motive may be shown. *State v. Palmer*; 65 N. H. 216; *Dodge v. Carroll*, 59 N. H. 237.

Threats.—Threats to do the act may be proved. *Caverno v. Jones*, 61 N. H. 623; *State v. Day*, 79 Me. 120; *State v. Bradley*, 64 Vt. 466, 24 Atl. 1053.

¹⁷ *R. v. Palmer*, 1856, printed report from Notes of Angelo Taylor and Gen. View, 230–272, *passim*.

¹⁸ *R. v. Patch*, 1805, Wills Circ. Ev. (4th ed.) 239; *R. v. Palmer*, ub. sup. (*passim*).

¹⁹ Common practice.

²⁰ *Moriarty v. London, Chatham and Dover Ry. Co.*, 1870, L. R. 5 Q. B. 314; compare *Grey v. Redman*, 1875, 1 Q. B. D. 161.

But a declaration that one will not do a certain act is not admissible to show that he did not do it. *Fowler v. Madison*, 55 N. H. 171.

Subsequent conduct.—The making of false statements after the alleged act, which would tend to give a wrong impression concerning the connection of the one sought to be held accountable with the act, may be shown. *State v. Reed*, 62 Me. 129; *State v. Benner*, 64 Me. 267.

And so may the fabrication of evidence, *State v. Williams*, 27 Vt. 226; and efforts to secure the absence of witnesses, *State v. Barron*, 37 Vt. 57; and attempts to bribe a juror, *Taylor v. Gilman*, 60 N. H. 506; or to escape justice. *State v. Frederic*, 69 Me. 400; *State v. Palmer*, 65 N. H. 216, 20 Atl. 6.

Untruthful statements with reference to the act are admissible. *State v. Reed*, 62 Me. 129.

Authorities on the last proposition of the text.—*Taylor v. Gilman*, 60 N. H. 506; *Lovell v. Briggs*, 2 N. H. 218.

CONNECTICUT.

Motive.—Authority for the rule of the text. *State v. Watkins*, 9 Conn. 52, 54.

Threats.—Threats to do the act may be shown. *Mead v. Husted*, 49 Conn. 337; *State v. Hoyt*, 46 Conn. 330; *State v. Hawley*, 63 Conn. 49; *State v. Kallaker*, 70 Conn. 398.

Remote and obscure allusions, by the accused, to the act in contemplation are admissible on a criminal prosecution, as tending to show an existing disposition or design. *State v. Hoyt*, 47 Conn. 538, 539.

The threats of third persons are not admissible. *State v. Beaudaut*, 53 Conn. 536.

Malice.—Declarations showing malice towards the victim are admissible. *Mead v. Husted*, 49 Conn. 337; *State v. Hoyt*, 46 Conn. 330.

Statement of intention.—And so is a declaration of intention to do the act. *Mills v. Sword Lumber Co.*, 63 Conn. 108.

Subsequent conduct.—Subsequent conduct of a party is often relevant and admissible to show the character of his prior acts or intentions. *Elwell v. Russell*, 71 Conn. 462.

The subsequent conduct of the alleged victim may also be shown, e. g., in assault with intent to procure an abortion. *State v. Lee*, 69 Conn. 186.

Evidence that the payee of a note, claimed to have been obtained by fraud, attempted to negotiate it at once, and offered a large commis-

sion for its sale, is admissible to prove the fraud. *Arnold v. Lane*, 71 Conn. 64.

Willingness or unwillingness to be searched may be shown. *Riley v. Gourley*, 9 Conn. 161.

The defendant was charged with keeping open a saloon on Sunday. It appeared that the officers entered by a cellar door and found the barkeeper and another man in the cellar; also a glass half full of beer; that they went up to the saloon, where they found the money-drawer on the floor, and a pail of beer on ice; that the defendant's wife objected to the removal of the beer. Held, that her conduct and statements were admissible. *State v. Hogan*, 67 Conn. 581.

To prove the terms of an implied contract to furnish water to the plaintiff's house in 1870, he was allowed to show that the defendant kept on furnishing him water for several years afterwards and sent in their bills every six months at a certain rate per year, though he did not pay them. Held, that this tended to show what had been their previous contract relations, and was admissible. *Morris v. Bridgeport Hydraulic Co.*, 47 Conn. 290.

The defendant was on trial for murder in shooting one S. Held, that a remark of the accused on the day following the homicide, indicating a clear recollection of statements made by and to him within a few minutes after the shooting on the previous day, were admissible as tending to show a guilty connection on his part with the crime charged. *State v. Cronin*, 64 Conn. 305.

In a civil case the conduct of any one naturally influenced by the alleged act may be shown. Thus the question being whether a gift was made, the conduct of the alleged donee may be shown. *Brown v. Butler*, 71 Conn. 582.

Authority on the last proposition of the text.—*Elwell v. Russell*, 71 Conn. 462.

MASSACHUSETTS.

Motive.—Facts supplying a motive may be shown in connection with other evidence. *Com. v. McCarthy*, 119 Mass. 354; *Com. v. Bradford*, 126 Mass. 42; *Com. v. Abbott*, 130 Mass. 472; *Com. v. Choate*, 105 Mass. 451; *Com. v. Hudson*, 97 Mass. 565; *Com. v. Vaughan*, 9 Cush. 594.

That the victim had been pressing the accused for payment of a debt is relevant, as showing motive, in a trial for murder. *Com. v. Webster*, 5 Cush. 295.

The fact of excessive insurance may be shown in the trial of the

owner of a house, who is charged with unlawfully burning it, as it tends to supply a motive. *Com. v. McCarthy*, 119 Mass. 354.

Evidence of motive must not be too remote. *Com. v. Abbott*, 130 Mass. 472.

Preparation.—Acts of preparation may be proved. *Com. v. Choate*, 105 Mass. 451; *Com. v. Blair*, 126 Mass. 40; *Com. v. Robinson*, 146 Mass. 571, 16 N. E. 452.

As tending to show whether a horse was sold with or without a warranty, the advertisement of the sale is admissible. *McGaughey v. Richardson*, 148 Mass. 608.

That the accused obtained the instruments with which the crime was committed may be proved. *Com. v. Roach*, 108 Mass. 289; *Com. v. Blair*, 126 Mass. 40.

Threats.—Threats to do the act may be shown. *Com. v. Holmes*, 157 Mass. 233; *Com. v. Crowe*, 165 Mass. 140.

Malice.—Declarations showing malice towards the victim are admissible. *Com. v. Goodwin*, 14 Gray, 55; *Com. v. Holmes*, 157 Mass. 233.

Subsequent conduct.—The making of false statements after the alleged act, which would tend to give a wrong impression concerning the connection of the one sought to be held accountable with the act, may be shown. *Com. v. Webster*, 5 Cush. 316, 52 Am. Dec. 711; *Com. v. Trefethen*, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235.

The accused, in order to meet evidence that he gave a false account of himself, cannot show that on other occasions he gave a true account. *Com. v. Goodwin*, 14 Gray, 55.

Hiding or flight after the act, to avoid arrest, may be proved. *Com. v. Annis*, 15 Gray, 197; *Com. v. Tolliver*, 119 Mass. 312; *Com. v. Brigham*, 147 Mass. 414.

And so may an attempt to bribe a juror. *Hastings v. Stetson*, 130 Mass. 76.

Authorities on the last statement of text.—*Morris v. French*, 106 Mass. 326; *Banfield v. Whipple*, 10 Allen, 27.

ARTICLE 8.*

STATEMENTS ACCOMPANYING ACTS, COMPLAINTS, STATEMENTS IN PRESENCE OF A PERSON.

Whenever any act may be proved, statements accompanying and explaining that act made by or to the person doing it may be proved if they are necessary to understand it.²¹

In criminal cases the conduct of the person against whom the offence is said to have been committed, and in particular the fact that soon after the offence he made a complaint to persons to whom he would naturally complain, are deemed to be relevant. The terms of the complaint are irrelevant; except that in a case of rape or other sexual offence where the consent of the person against whom the offence was committed to the act charged as an offence is in issue, the terms of the complaint are relevant as showing that the conduct of such person was consistent with the denial of consent.²²

When a person's conduct is in issue or is deemed to be relevant to the issue, statements made in his presence and hearing by which his conduct is likely to have been affected, are deemed to be relevant.²³

* See Note V.

²¹ Illustrations (a) and (b). Other statements made by such persons are relevant or not according to the rules as to statements hereinafter contained. See ch. iv. *post*.

²² *R. v. Lillyman*, [1896], 2 Q. B. 167; see Illustration (c) and the note thereto.

²³ *R. v. Edmunds*, 1833, 6 C. & P. 164; *Neil v. Jakle*, 1849, 2 C. & K. 709.

Illustrations.

(a) The question is, whether A committed an act of bankruptcy, by departing the realm with intent to defraud his creditors.

Letters written during his absence from the realm, indicating such an intention, are deemed to be relevant facts.²⁴

(b) The question is, whether A was sane.

The fact that he acted upon a letter received by him is part of the facts in issue. The contents of the letter so acted upon are deemed to be relevant, as statements accompanying and explaining such conduct.²⁵

(c) The question is whether A was ravished.

The fact that shortly after the alleged rape, she made a complaint relating to the crime, and the terms of the complaint, and the circumstances under which it was made, are relevant.²⁶

The fact that, without making a complaint, she said that she had been ravished, is not deemed to be relevant as conduct under this article, though it might be deemed to be relevant (*e. g.*) as a dying declaration under article 26.

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), sec. 108; 2 Taylor on Evidence (Chamberlayne's 9th ed.), p. 391⁴⁶, sec. 581; Underhill on Evidence, sec. 52.

Statements accompanying act.—Authorities on the first paragraph of the text. *Hall v. Young*, 37 N. H. 134; *Carter v. Beals*, 44 N. H. 408; *Whittemore v. Wentworth*, 76 Me. 20.

Declarations of one paying money are admissible on an issue involving the application to be made of the payment. *Woodstock v. Clark*, 25 Vt. 308.

²⁴ *Rawson v. Haigh*, 1824, 2 Bing. 99; *Bateman v. Bailey*, 1794, 5 T. R. 512.

²⁵ *Wright v. Doe d. Tatham*, 1837, 7 A. & E. 324-5 (*per* Denman, C. J.).

²⁶ *R. v. Lillyman*, [1896], 2 Q. B. 167. The above illustration and that portion of the text which is founded on it, are intended to express the decision in this case; but see Note V. as to the difficulties to which it has given rise.

Where sanity is in question statements accompanying conduct are relevant. *Foster's Exrs. v. Dickerson*, 64 Vt. 233.

In questions of domicile and the like, statements accompanying an act of removal are admissible. *Fulham v. Howe*, 62 Vt. 386; *Deer Isle v. Winterport*, 87 Me. 37; *Rudd v. Rounds*, 64 Vt. 432.

Complaints.—The American authorities generally state the rule that the fact of complaint is relevant as applying only to prosecutions for rape and other offenses against women. *American Law Review*, vol. xiv, pp. 829–838; *Haynes v. Com.*, 28 Gratt. (Va.) 942, and the authorities at the head of this note.

In rape cases the fact of complaint may be shown. *State v. Carroll*, 67 Vt. 477.

A delay of weeks or months, if explained, does not render the fact of complaint inadmissible. *State v. Wilkins*, 66 Vt. 1.

The terms of the complaint are irrelevant. *State v. Knapp*, 45 N. H. 148, 155.

Statements of others.—Authorities on the rule of the text that statements made in the presence of one are admissible. *Johnson v. Day*, 78 Me. 224, 3 Atl. 647; *Morrill v. Richey*, 18 N. H. 295; but see *Mattocks v. Lyman*, 16 Vt. 113.

The admissibility of statements made in the presence of a person under the last paragraph of the text, rests upon the theory that tacit acquiescence constitutes an admission. *Johnson v. Day*, 78 Me. 224. The rule applies when the statements charge the commission of a crime. *State v. Reed*, 62 Me. 129.

The rule does not apply where the circumstances are such that the person cannot speak, as where the statements are made in court. *State v. Boyle*, 13 R. I. 537; but see *Brainard v. Buck*, 25 Vt. 573, 60 Am. Dec. 291. But if the person were subsequently called as a witness, and had an opportunity to reply, the rule of the text is applicable. *Blanchard v. Hodgkins*, 62 Me. 119.

It has no application where a reply is not naturally called for, *Gale v. Lincoln*, 11 Vt. 152; *Hersey v. Barton*, 23 Vt. 685; *Pierce's Admr. v. Pierce*, 66 Vt. 369, 29 Atl. 364; or where the person has no knowledge of the interest affected by the claim of admission or of the facts. *Ware v. Ware*, 8 Me. 42; *Robinson v. Blen*, 20 Me. 109.

CONNECTICUT.

Statements accompanying act.—Where sanity is in question, statements accompanying conduct are relevant. *Barber's Appeal*, 63 Conn. 393.

Where the residence of one is in issue, a statement while travelling towards the place claimed on the trial as his residence, that he "was going home" to B, is admissible. *New Milford v. Sherman*, 21 Conn. 112.

In order that evidence be admissible as part of the *res gestæ* the act which it characterizes, and of which it forms a part, must be admissible. *Pinney v. Jones*, 64 Conn. 550, 42 Am. St. Rep. 209.

The declarations of a party in favor of his own title are not admissible except where they are a part of the *res gestæ*. *Saugatuck Cong. Soc. v. East Saugatuck School Dist.*, 53 Conn. 480.

Nor are those of his grantor in support of his title. *Smith v. Martin*, 17 Conn. 401.

Declarations of one having the legal title to lands, made when in possession, that he holds as tenant of his grantor, would generally be admissible to show the nature and extent of his occupation, and as part of the *res gestæ*. *Reading v. Weston*, 7 Conn. 148.

The owner of a farm directed one C to show a hired laborer over it, and C, in doing so, pointed out a heap of stones as one of its boundaries. Held, that the testimony of the laborer to these facts was admissible, in a suit between a subsequent grantee of the farm and another, when offered by the latter to show its boundaries. *Hill v. Bennett*, 23 Conn. 365.

If an owner of land, while in possession, points out to an adjoining proprietor what he claims to be their dividing line, and digs a ditch there as a boundary, these acts, and the accompanying declarations, forming part of the *res gestæ*, are evidence against one claiming under him, in favor of a third adjoining proprietor, the place of whose boundary line depends on the place of that pointed out and marked by the ditch. *Deming v. Carrington*, 12 Conn. 7.

Upon removing an ancient fence, the owner of the land placed a stone in one of the post-holes. Held, that his declaration, made on the next day to a third party, that he placed it there as a boundary mark, was inadmissible in his favor in a subsequent suit involving the extent of his ownership. *Noyes v. Ward*, 19 Conn. 269.

The defendant in ejectment claimed to have acquired a title by adverse possession against the plaintiff's testator. Held, that acts of the testator done in and about the premises, with his accompanying declarations, both tending to show his continued possession, were admissible in rebuttal; but that his naked declarations to the same effect, made away from the premises, and not in the defendant's presence, were inadmissible. *Comins v. Comins*, 21 Conn. 418.

To make declarations admissible, as part of the *res gestæ*, they must have been made at the time of the act done, which they are supposed to characterize, and have been calculated to unfold the nature and quality of the facts they were intended to explain, and so to harmonize with them as obviously to constitute one transaction. *Enos v. Tuttle*, 3 Conn. 250; *Russell v. Frisbie*, 19 Conn. 209; *New England Mfg. Co. v. Starin*, 60 Conn. 371. See *Bevin v. Conn. Mut. Life Ins. Co.*, 23 Conn. 254.

It is not enough to prove that the declarations were made about the time of doing the act. *Comstock v. Hadlyme*, 8 Conn. 263.

Declarations accompanying and characterizing an act are admissible only so far as they tend directly to accomplish this purpose. *Ford v. Haskell*, 32 Conn. 492.

In an action for personal injuries, the plaintiff may prove the statements as to the character and seat of his sensations, made by him to his physician, for the purpose of receiving medical advice and treatment. *Wilson v. Grimby*, 47 Conn. 76.

The question being where the commanding officers of a company of soldiers on a steamboat were, and what they were doing to keep order at the time of a disturbance on board, evidence was offered of a conversation between a sergeant and commissioned officer in the saloon, referring to the disturbance as then going on upon deck, and the action to be taken to quiet it. Held, to be admissible on the question at issue, and as part of the *res gestæ*. *Flint v. Norwich & New York Transp. Co.*, 7 Blatchf. 543-547 (U. S. Circuit Court); affirmed on error, S. C., 13 Wall. 3.

Declarations made by one as he is leaving town, that he is going to a particular place for a particular purpose, are admissible in favor of his representatives, as a part of the *res gestæ*. *Douglas v. Chapin*, 26 Conn. 92.

In an action against A as owner of a dog, which had bitten the plaintiff, it was proved that the dog was in the possession of B, but that A took him into his possession the next morning. Held, that A, who claimed that B owned him at the time of the injury, might show that on the next morning B told him that he knew he had bought the dog of him (A), but that he would keep him no longer; since this explained A's resumption of possession. *Burns v. Fredricks*, 37 Conn. 92.

To disprove a prescriptive right of way, evidence was introduced that a former owner of the land had ploughed and cultivated it. Held, that his declarations, at the time, to the effect that there was

no right of way there, but only a way by license, might be given for the purpose of characterizing the act. *Sears v. Hayt*, 37 Conn. 407.

In an action of trespass to try the title to lands, the plaintiff claimed title by adverse possession, and the defendant, who claimed title from D, the original owner, offered evidence that during the fifteen years, one C, since deceased, was in possession. Held, that, to show the character of this possession, he might also give in evidence C's declarations, made while harvesting the crops, that he held the land under D, and was to deliver a part of the crops to him. *Williams v. Ensign*, 4 Conn. 457, 458.

To prove the possession of land by a Protestant Episcopal society, under a claim of right, held, that they might introduce testimony of declarations made by one of their wardens, since deceased, while warning persons who were digging turf on the land to desist, to the effect that the society owned all the land between certain boundaries, under a grant from the proprietors of common lands. *St. Peter's Church v. Beach*, 26 Conn. 361, 365.

Narrative of past events.—In an action for injuries caused by the bite of a dog, evidence of the declaration of the plaintiff that she had been bitten by the dog, made to her mother within five minutes of the injury, is but a narrative of a past event, and inadmissible as part of the *res gestæ*. *M'Carrick v. Kealy*, 70 Conn. 642.

A statement as to the consideration and origin of a note, made by the payee when delivering it, is a narrative of a past event and inadmissible. *Baxter v. Camp*, 71 Conn. 246.

The declaration of a party that he intends to do an act or pursue a course of conduct is admissible where the issue is whether the party did that act or pursued that course of conduct; but where there is no such issue, a declaration of such intent cannot be admitted as a part of the *res gestæ*, there being no fact which it serves to illustrate or explain. *Mills v. Swords Lumber Co.*, 63 Conn. 109.

Complaints.—In Connecticut the converse of the rule of the text as to complaints in prosecutions for offenses against women has been held and the terms of the complaint are considered relevant. *State v. Kinney*, 44 Conn. 153, 26 Am. Rep. 436. See, also, *Benton v. Starr*, 58 Conn. 285.

A delay of more than a year does not render the fact of complaint inadmissible. It simply affects the weight of the evidence. *State v. Byrne*, 47 Conn. 465, 466, 467.

Evidence of constancy in accusation is admissible. *State v. De Wolf*, 8 Conn. 99.

The conduct of a woman subsequent to the commission of an alleged abortion may be shown in a prosecution against one for performing the abortion. *State v. Lee*, 69 Conn. 196.

Statements of others.—An authority for the rule of the text as to the admissibility of statements made in the presence of a person is *Waldridge v. Arnold*, 21 Conn. 424.

To show due diligence in the service of an attachment, evidence of answers given by strangers to inquiries made by the officer respecting the debtor, is admissible; they being part of the *res gestæ*. *Phelps v. Foot*, 1 Conn. 391.

MASSACHUSETTS.

Statements accompanying act.—Massachusetts authority on the first sentence of the text. *Lund v. Tyngsborough*, 9 Cush. 36, 41; *Kingsford v. Hood*, 105 Mass. 495; *Place v. Gould*, 123 Mass. 347; *Milford v. Bellingham*, 16 Mass. 108; *Deveney v. Baxter*, 157 Mass. 9.

In questions of domicile, statements accompanying the act of removal are admissible. *Viles v. Waltham*, 157 Mass. 542; *Johnson v. Sherwin*, 3 Gray, 374.

Complaint.—In rape cases the fact of complaint is admissible. *Com. v. Phillips*, 162 Mass. 504.

The fact is admissible as part of the *res gestæ*. *Com. v. McPike*, 3 Cush. 181, 184, 50 Am. Dec. 729.

Statements of others.—The admissibility of statements made in the presence of a person, under the last paragraph of the text, rests upon the theory that tacit acquiescence constitutes an admission. *Proctor v. Old Colony R. R. Co.*, 154 Mass. 251. Authorities for the rule itself are *B. & W. R. R. Co. v. Dana*, 1 Gray, 83; *Com. v. Call*, 21 Pick. 515.

The rule applies where statements charge the commission of a crime. *Com. v. Galavan*, 9 Allen, 271.

The failure to reply to a statement charging a crime may be proved. *Com. v. Brailey*, 134 Mass. 527.

It does not apply where the person cannot hear or comprehend the statements. *Tufts v. Charlestown*, 4 Gray, 537. Such evidence may go to the jury with the evidence showing that the statement was not heard. *Mallen v. Boynton*, 132 Mass. 443; *Com. v. Sliney*, 126 Mass. 49.

The rule does not apply where the conditions are such that a reply is not naturally called for. *Drury v. Hervey*, 126 Mass. 519. If a reply is made it is admissible. *Com. v. Trefethen*, 157 Mass. 180.

ARTICLE 9.

FACTS NECESSARY TO EXPLAIN OR INTRODUCE RELEVANT FACTS.

Facts necessary to be known to explain or introduce a fact in issue or relevant or deemed to be relevant to the issue, or which support or rebut an inference suggested by any such fact, or which establish the identity of any thing or person whose identity is in issue or is or is deemed to be relevant to the issue, or which fix the time or place at which any such fact happened, or which show that any document produced is genuine or otherwise, or which show the relation of the parties by whom any such fact was transacted, or which afforded an opportunity for its occurrence or transaction, or which are necessary to be known in order to show the relevancy of other facts, are deemed to be relevant in so far as they are necessary for those purposes respectively.

Illustrations.

(a) The question is, whether a writing published by A of B is libellous or not.

The position and relations of the parties at the time when the libel was published may be deemed to be relevant facts as introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are not deemed to be relevant under this article, though the fact that there was a dispute may be deemed to be relevant if it affected the relations between A and B.²⁷

(b) The question is, whether A wrote an anonymous letter, threatening B, and requiring B to meet the writer at a certain time and place to satisfy his demands.

²⁷ Common practice.

The fact that A met B at that time and place is deemed to be relevant, as conduct subsequent to and affected by a fact in issue.

The fact that A had a reason, unconnected with the letter, for being at that time at that place, is deemed to be relevant, as rebutting the inference suggested by his presence.²⁸

(c) A is tried for a riot, and is proved to have marched at the head of a mob. The cries of the mob are deemed to be relevant, as explanatory of the nature of the transaction.²⁹

(d) The question is, whether a deed was forged. It purports to be made in the reign of Philip and Mary, and enumerates King Philip's titles.

The fact that at the alleged date of the deed, Acts of State and other records were drawn with a different set of titles, is deemed to be relevant.³⁰

(e) The question is, whether A poisoned B. Habits of B known to A, which would afford A an opportunity to administer the poison, are deemed to be relevant facts.³¹

(f) The question is, whether A made a will under undue influence. His way of life, and relations with the persons said to have influenced him unduly, are deemed to be relevant facts.³²

AMERICAN NOTE.

GENERAL.

Authorities.— Underhill on Evidence, secs. 186, 215, 375; Abbott's Trial Evidence (2d ed.), p. 129; *State v. Witham*, 72 Me. 531 (Identity).

Where two persons bear the same name, facts are admissible which tend to make it probable that one of them and not the other entered into the contract upon which the suit is brought. *Jones v. Parker*, 20 N. H. 31.

Relation of the parties.— *Roach v. Caldbeck*, 64 Vt. 593.

²⁸ *R. v. Barnard*, 1758, 19 St. Tri. 815, &c.

²⁹ *R. v. Lord George Gordon*, 1781, 21 St. Tri. 514, 515, 520, 529, 532, &c.

³⁰ *Lady Ivy's Case*, 1684, 10 St. Tri. 617, 618.

³¹ *R. v. Donellan*, 1781, Wills Circ. Ev. 241; and see my 'History of the Criminal Law,' iii. 371.

³² *Boyse v. Rossborough*, 1857, 6 H. L. C. 42-58.

CONNECTICUT.

Evidence, in itself inadmissible, may be rendered admissible by being offered in connection with other evidence which is admissible. *Gage v. Smith*, 27 Conn. 75; *State v. Stevens*, 65 Conn. 93; *Plumb v. Curtis*, 66 Conn. 154; *Canton v. Burlington*, 58 Conn. 283.

Rebutting evidence.—Where it is alleged that one has committed a trespass, and evidence is introduced that he was at the place, he may show in rebuttal that he was there for another purpose. *Prindle v. Glover*, 4 Conn. 266.

Evidence received on rebuttal, if not objected to, is before the court for any legitimate purpose. *Alling v. Forbes*, 68 Conn. 575.

Upon a petition for a divorce, brought by the husband on the ground of adultery, he proved that the respondent was found in company with another man, one night, under suspicious circumstances. To show that she was lured into this situation by the fraudulent collusion of the petitioner, and to repel the presumption against this, arising from the marriage relation, the respondent offered the testimony of persons, who had for a long time previously lived in the family, to prove repeated acts of unkindness on the part of the petitioner towards her, manifesting an aversion for her. Held, that such testimony was properly excluded as irrelevant, and as leading to an interminable investigation. *Austin v. Austin*, 10 Conn. 224.

Where, in defense to a prosecution for rape, the defendant introduced testimony as to his general good character,—Held, that the State might ask, on cross-examination, whether a certain lewd woman had not lived for some time in his family. *State v. Watkins*, 9 Conn. 52–54; *State v. Jerome*, 33 Conn. 269.

On the trial of one charged with murdering his wife, evidence is admissible that an adulterous intercourse between him and another woman had subsisted for months previous to the murder, in order to repel the presumption against his being the murderer, arising from the marital relation. *State v. Watkins*, 9 Conn. 52–54.

On a prosecution for murdering a woman to whom the prisoner had been married, and with whom he was living as her husband, the State introduced evidence that he had a wife, at the time of his marriage to the deceased, who was still living; that he married the deceased under a different name from that previously borne by him, and imposed upon her by false letters and papers; and that, five weeks after her decease, he married again. Held, that this was proper to repel the presumption of innocence arising from the ap-

parent relation of the prisoner to the deceased. *State v. Green*, 35 Conn. 205-209.

Identity.—The jury may find that “Asahel Moss, 2d,” on the tax-books, is meant for Asahel Morse. *Litchfield v. Farmington*, 7 Conn. 100.

Fixing time.—It is admissible to prove the time when a certain occurrence, foreign to the case, took place, for the purpose of fixing by it the time when a certain act, within the case, was done. *Quintard v. Corcoran*, 50 Conn. 38.

MASSACHUSETTS.

Explanatory facts.—Authority on the first point in the text. *Hughes v. Gross*, 166 Mass. 61, 43 N. E. 1031, 32 L. R. A. 620.

Evidence of the extravagance of the accused is relevant in connection with other evidence upon the question of whether or not he was guilty of embezzlement. *Hackett v. King*, 8 Allen, 144.

Evidence of the expenditures of a husband is relevant upon the question of whether certain articles are necessities for his wife. *Raynes v. Bennett*, 114 Mass. 424.

Rebutting evidence.—As supporting the rule of the text, see *Norris v. Spofford*, 127 Mass. 85.

On the question of whether a burner was lighted, evidence that on certain other occasions it was not lighted, is admissible to rebut testimony that there was a custom to keep it lighted. *Wentworth v. Eastern R. R. Co.*, 143 Mass. 248.

Identity.—*Com. v. Whitman*, 121 Mass. 361; *Com. v. Irwin*, 107 Mass. 401; *McDonald v. Savoy*, 110 Mass. 49; *Robinson v. Litchfield*, 112 Mass. 28; *Com. v. Bush*, 112 Mass. 280; *Com. v. Snow*, 116 Mass. 47; *Com. v. Dorsey*, 103 Mass. 412; *Com. v. Campbell*, 155 Mass. 537.

Where a bottle of beer is sent, labelled and sealed, by express, to an assayer, and the assayer testifies as to a bottle so labelled, there is no ground of exception so far as the point as to identity of the beer is concerned. *Com. v. Bentley*, 97 Mass. 551.

Testimony of the witness that he “thought” the person accused was the offender may be sufficient identification. *Com. v. Munsey*, 112 Mass. 287.

Testimony that the offender “looked pretty near like” the accused, is not sufficient identification. *Com. v. Snow*, 14 Gray, 385.

Where there is testimony as to identification by voice, the accused, not being a witness, may not repeat something to the jury in rebuttal. *Com. v. Scott*, 123 Mass. 222.

A witness who has heard the defendant talk but once, may testify as to identification by the voice, but the jury may be instructed not to convict upon that evidence alone. *Com. v. Williams*, 105 Mass. 62; *Com. v. Hayes*, 133 Mass. 185.

Positive direct evidence of the identity of the accused is not necessary if the jury are satisfied of the fact. *Com. v. Cunningham*, 104 Mass. 545.

Where one is asked who did a certain thing, an answer "that man" (pointing to the defendant) is proper. *Com. v. Whitman*, 121 Mass. 361.

Any person is a competent witness to testify as to the identity of persons, things or handwriting. *Com. v. Sturtivant*, 117 Mass. 122.

Upon the issue of identity the appearance of a person two years before and after the date in question is competent. *Com. v. Campbell*, 155 Mass. 537.

Fixing time.—A letter cannot be introduced to establish the time of its receipt. *Com. v. Burns*, 7 Allen, 540.

Conversations, in order to be admissible to fix a date, must have reference to something which tends to establish it. *Fiske v. Cole*, 152 Mass. 335.

CHAPTER III.

*OCCURRENCES SIMILAR TO BUT UNCONNECTED WITH THE
FACTS IN ISSUE, IRRELEVANT EXCEPT IN CERTAIN
CASES.*

ARTICLE 10.*

SIMILAR BUT UNCONNECTED FACTS.

A FACT which renders the existence or non-existence of any fact in issue probable by reason of its general resemblance thereto and not by reason of its being connected therewith in any of the ways specified in articles 3-9 both inclusive, is deemed not to be relevant to such fact except in the cases specially excepted in this chapter.

Illustrations.

(a) The question is, whether A committed a crime.

The fact that he formerly committed another crime of the same sort, and had a tendency to commit such crimes, is deemed to be irrelevant.¹

(b) The question is, whether A, a brewer, sold good beer to B, a publican. The fact that A sold good beer to C, D, and E, other publicans, is deemed to be irrelevant² (unless it is shown that the beer sold to all is of the same brewing).³

* See Note VI.

¹ *R. v. Cole*. 1 Phi. Ev. 508 (said to have been decided by all the Judges in Mich. Term, 1810).

² *Holcombe v. Hewson*, 1810, 2 Camp. 391.

³ See Illustrations to Article 3.

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), secs. 52 and 53; Underhill on Evidence, sec. 8; Taylor on Evidence (Chamberlayne's 9th ed.), p. 257¹; *State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69; *Flagg v. Willington*, 6 Me. (6 Greenl.) 386; *Parker v. Poland Pub. Co.*, 69 Me. 173, 31 Am. Rep. 262; *Dodge v. Haskell*, 69 Me. 429; *Handley v. Call*, 27 Me. (14 Shep.) 35; *Staples v. Smith*, 48 Me. 470; *Hall v. Tribou*, 42 Me. 192; *McLoon v. Spaulding*, 62 Me. 315; *Tower v. Rutland*, 56 Vt. 28; *Keith v. Taylor*, 3 Vt. 153; *Nones v. Northouse*, 46 Vt. 587; *Whitney v. First Nat. Bank*, 55 Vt. 154, 45 Am. Dec. 598; *Harris v. Howard*, 56 Vt. 695; *Phelps v. Conant*, 30 Vt. 277; *Jones v. N. Y., N. H. & H. R. R. Co.*, 20 R. I. 210, 37 Atl. 1033, 11 Am. & Eng. R. Cas. (N. S.) 414, 3 Am. Neg. Rep. 496; *Hopkins v. Howard*, 20 R. I. 394, 39 Atl. 519; *Agulino v. N. Y., N. H. & H. R. R. Co.*, 21 R. I. 263, 43 Atl. 63, 6 Am. Neg. Rep. 199, 14 Am. & Eng. R. Cas. (N. S.) 314; *Stone v. Pendleton*, 21 R. I. 332, 43 Atl. 643; *Leighton v. Sargent*, 31 N. H. (11 Fost.) 119, 64 Am. Dec. 323; *True v. Sanborn*, 27 N. H. (7 Fost.) 383; *Filer v. Peebles*, 8 N. H. 226; *Mead v. Merrill*, 33 N. H. 437; *Foye v. Leighton*, 22 N. H. (2 Fost.) 71, 53 Am. Dec. 231; *Swampscott Machine Co. v. Walker*, 22 N. H. (2 Fost.) 457, 55 Am. Dec. 172.

Instances.—Similar, but unconnected accidents, cannot be proved. *Hubbard v. R. R. Co.*, 39 Me. 506.

The question is, whether A sold meat improperly slaughtered and unwholesome.

The fact that A, several years previous to the sale complained of, had sold similar meat is irrelevant. *True v. Sanborn*, 27 N. H. (7 Fost.) 383.

The question is, whether there was sewer gas in a given house, connected with a public sewer, from which the inmates suffered.

The facts that the inmates of two other houses, situated on the same street and connected with the same public sewer, did not perceive the presence of sewer gas therein, and were not injuriously affected by it, are deemed irrelevant. *Bateman v. Rutland*, 70 Vt. 500, 41 Atl. 500.

The question is, whether A was so important as to require the appointment of a guardian to manage her estate.

The fact that A had been very imprudent ten years or more before

the filing of the petition by the overseer of the poor is irrelevant. *Hopkins v. Howard*, 20 R. I. 394, 39 Atl. 519.

The question is, whether A, a testator, was insane.

Letters of B, who was proved to be insane, offered for the purpose of showing that insane persons might rationally write and converse, are irrelevant on the question of A's sanity. *Ware v. Ware*, 8 Me. (8 Greenl.) 42.

The question is, what wages A, a carpenter, was to receive per day.

Evidence of what wages other carpenters received in other towns in another State, is irrelevant. *Noyes v. Fitzgerald*, 55 Vt. 49.

Similar crimes.—Under Illustration (a) see *Dodge v. Haskell*, 69 Me. 429; *State v. Renton*, 15 N. H. 169, 174; *State v. Wentworth*, 37 N. H. 197, 209; *Reed v. Spaulding*, 42 N. H. 114–124; *State v. Lapage*, 57 N. H. 245; *State v. Hopkins*, 50 Vt. 316; *State v. Kelley*, 65 Vt. 531, 27 Atl. 203, 36 Am. Rep. 884.

Limitations of the rule.—In Best's Principles of Evidence (Chamberlayne's 5th ed.), p. 488n, it is said:

"The grounds of the rule are, therefore, entirely practical; viz.: (1) to prevent multiplicity of collateral issues, confusing the jury and acting as a surprise upon the parties; (2) to provide that a man shall not be convicted of one crime by evidence that he has committed another. *Hubbard v. R. R. Co.*, 39 Me. 506. This being the case, there may be said to exist in the United States, a strong tendency to limit the rule in civil causes. This relaxation appears most commonly in the numerous cases where the necessary proof of liability consists in strengthening a *possible* into a *probable* cause by elimination of all complicating circumstances; in other words, by establishing the desired relation of cause and effect through the inductive process of tracing the same effect through a variety of instances where the cause for which legal liability is claimed is the only constant force."

Where the question is as to whether certain facts were the result of alleged causes, other effects of the causes may be shown.

The following cases illustrate the limitations of the rule of the text:

Value.—On questions of value, evidence as to similar property is relevant. *Norton v. Willis*, 73 Me. 580; *Warren v. Wheeler*, 21 Me. 484; *Fogg v. Hill*, 21 Me. 529; *Snow v. B. & M. R. R. Co.*, 65 Me. 230; *Thornton v. Campton*, 18 N. H. 20; *March v. R. R. Co.*, 19 N. H. 376; *Concord R. R. Co. v. Greely*, 23 N. H. 242; *Hoit v. Russell*, 56 N. H. 559; *White v. R. R. Co.*, 30 N. H. 188; *Hildreth v. Fitts*, 53 Vt. 684;

Clemons v. Clemons, 68 Vt. 77; *Cross v. Wilkins*, 43 N. H. 332; *Melvin v. Bullard*, 35 Vt. 268; but the valuation of the tax assessors is irrelevant. *Concord Land & Water-Power Co. v. Clough*, 69 N. H. 609, 45 Atl. 565.

Highway injuries.—In suits for injuries on the highway, evidence as to the condition of the road about the same time, a short distance from the exact spot, is admissible. *Kent v. Lincoln*, 32 Vt. 591.

Evidence that other horses had been frightened at the same obstacle is admissible. *Darling v. Westmoreland*, 52 N. H. 401; *Crocker v. McGregor*, 76 Me. 282; *Gordon v. Boston, etc., R. R. Co.*, 58 N. H. 396.

Negligence.—Evidence of negligence on previous occasions is not admissible in suits for negligence. *Parker v. Portland Pub. Co.*, 69 Me. 173, 31 Am. Rep. 262. See, also, *Bremner v. Newcastle*, 83 Me. 415.

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Authorities.—*Morris v. East Haven*, 41 Conn. 252; *Chapman v. Champion*, 2 Day, 101; *Hoxie v. Home Ins. Co.*, 32 Conn. 21; *Gorham v. Gorham*, 41 Conn. 242; *Edwards v. Warner*, 35 Conn. 517; *Beach v. Catlin*, 4 Day, 284; *Robbins v. Harvey*, 5 Conn. 335; *Hoadley v. M. Seward & Son Co.*, 71 Conn. 640, 42 Atl. 997; *Irving v. Shethar*, 71 Conn. 434, 42 Atl. 25; *Cunningham v. Fair Haven & Westville R. Co.*, 72 Conn. 244, 43 Atl. 1047, 6 Am. Neg. Rep. 427; *Anderson v. Cowles*, 72 Conn. 335; *State Bank v. Waterhouse*, 70 Conn. 76.

Instances.—In an action for assault, similar assaults cannot be proved. *Mathews v. Terry*, 10 Conn. 459.

An information for adultery charged a single act of adultery in a single count. Held, that, having given evidence of one such act, the State could not proceed to show other instances of the same crime committed with the same person at other times and places. *State v. Bates*, 10 Conn. 373.

A judgment in a civil action is not evidence, conclusive or otherwise, of the fact thereby established, in a subsequent criminal prosecution against one of the parties, in which the same question is again involved. *State v. Bradnack*, 69 Conn. 212.

On the trial of an action on the warranty of a horse, the plaintiff, who testified in his own behalf, was asked, on cross-examination, how many other purchases of horses he had made in the last twenty years, and tried to set aside on the ground that he had discovered defects in them. Held, to be inadmissible, as raising an outside and irrelevant issue. *Russell v. Cruttenden*, 53 Conn. 564.

Limitations of the rule; value.— On question of value, evidence is admissible touching the value of the same property at other times, and that of similar property. *Beach v. Clark*, 51 Conn. 200; *Freeman's Appeal*, 71 Conn. 708; *Abbott v. Wyse*, 15 Conn. 260. And evidence of its selling price is admissible. *Sanford v. Peck*, 63 Conn. 494.

But a tax assessment is inadmissible. *Martin v. N. Y. & N. E. R. R. Co.*, 62 Conn. 331, 343, 25 Atl. 239.

Evidence of the value of real estate at a certain date is relevant upon the question of its value about a year later. *Freeman's Appeal*, 71 Conn. 708.

To show the market price of lumber in H, a river town, evidence was held admissible of its market price at the time in question at M, fifteen miles down the river from H, accompanied by evidence that, ordinarily, the price of lumber in these two towns is the same. *Abbott v. Wyse*, 15 Conn. 260.

One sent by the plaintiff, a physician, as a substitute to attend the defendant, testified on his direct examination as to the reasonableness of the plaintiff's charges. Held, that upon his cross-examination he might be asked whether his own charges for the same services were reasonable, and how much they were. *Sayles v. Fitzgerald*, 72 Conn. 392.

In a suit by an attorney for fees for advice and trial in the Superior Court, having testified that his charges were reasonable, he was asked, on cross-examination, what his customary charges per day were for trying cases before a justice of the peace. Held, no error to admit the question, but that it tended to furnish a legitimate standard of comparison. *Phelps v. Hunt*, 43 Conn. 198.

But in a suit by an attorney for services, evidence of what another attorney received for similar services is inadmissible. *Robbins v. Harvey*, 5 Conn. 341.

The plaintiff, who for twenty years had made nursing her business, was employed to take care of a sick person. After his death she sued his executor for compensation. Held, that the defendant could not introduce evidence as to what a person of considerable experience in taking care of the sick in his own family and among his neighbors would have been willing to do it for. *Hull v. Gallup*, 49 Conn. 281.

Negligence.— A party cannot show that he was not negligent upon one occasion, by proving that he was careful on other occasions. *Laufer v. Bridgeport Traction Co.*, 68 Conn. 475.

Custom — Negligence.— It is a general rule that a party charged with negligent conduct will not be allowed to show that such conduct

was common or customary among those engaged in an occupation similar to his own, or among those placed in like circumstances and owing the same duties. *Bassett v. Shares*, 63 Conn. 43.

Highway injuries.— In an action for leaving a pile of stones in the road, at which the plaintiff's horse was frightened,— Held, that the plaintiff, to prove that his horse was a gentle one, might show how near he had been driven to moving trains of railway cars, and other dangerous objects, without being frightened. *Clinton v. Howard*, 42 Conn. 309.

The plaintiff's horse ran away, and injured the wagon, from taking fright at a mill wheel revolving near the highway. Held, in an action against the millowner for the injury, that evidence was admissible, that eleven years before, another horse, driven by another party, became frightened at the same wheel, although the defendant had never known of this. *House v. Metcalf*, 27 Conn. 636.

In suits for injuries on the highway, evidence as to the condition of the road about the same time, a short distance from the exact spot, is admissible. *Bailey v. Trumbull*, 31 Conn. 581.

The question is, whether a particular place in the roadbed of a street-railway company was defective and in need of repairs. The fact that other places in the roadbed were in want of repairs is deemed irrelevant. *Cunningham v. Fair Haven & Westville R. R. Co.*, 72 Conn. 244, 6 Am. Neg. Rep. 427, 43 Atl. 1047.

In a suit for negligence, evidence is not admissible that, a little distance beyond where the accident happened, and in the side track, there were logs and other obstructions, and that other persons had been injured in passing over them. The only question was as to the condition of the precise place where the plaintiff was injured, and as to the state of things which caused his injury. *Burr v. Town of Plymouth*, 48 Conn. 461.

In an action to recover for injuries received in consequence of an obstacle upon the sidewalk, of such a character that the attention of all who passed that way would naturally be drawn to it, and their experience of its effect in obstructing travel be substantially the same, evidence that others passed it without harm, when it was in the same condition as at the time when the plaintiff received her injury, is admissible to show that it was not dangerous to one using ordinary care. *Calkins v. Hartford*, 33 Conn. 58, 59. (The chief justice dissenting.) See *Bill v. Norwich*, 39 Conn. 222.

To disprove the necessity of a railing on the side of a highway, for want of which an accident to the plaintiff was claimed to have hap-

pened, evidence was offered that no one else had ever been injured by any accident attributable to the same cause. Held, inadmissible, unless it could be shown that there had been no such accidents in cases where the travel had been (as in the plaintiff's case) off the ordinary travelled way. *Taylor v. Monroe*, 43 Conn. 42, 43.

In an action for an injury to the plaintiff's team from the breaking down of a bridge, the town claimed that the load was unreasonably heavy, and the plaintiff introduced a witness who testified that it was not, and that he had been accustomed to draw such loads through the neighboring towns, without breaking through any bridge. Held, that the town might show that the loads drawn by this witness had seriously injured the roads over which they had been taken. *Wilson v. Granby*, 47 Conn. 75.

Where the use of a road made by the plaintiff's intestate was otherwise than passing along it in the usual way, it was held, that the court properly charged the jury that the fact that other persons had passed and repassed for several years over the highway at the place in question without accident, was not evidence that the town had performed its duty in making the highway reasonably safe. *Lutton v. Vernon*, 62 Conn. 8.

In a case involving the condition of a highway, the plaintiffs, without objection, introduced evidence that the part of the highway in question was in a worse condition than any other highway of the town. To rebut this evidence, the town was permitted, against the objection of the plaintiffs, to introduce testimony relative to the condition of the other highways. Held, that such evidence was admissible, to show what should be the proper condition of a road, and that this might be done by showing the condition of roads similarly situated. *Havens v. Wethersfield*, 67 Conn. 536.

To show the existence and character of a hole in a bridge, which caused an injury to the plaintiff, one witness testified that he took pains to avoid getting his wheel into it, another that his wheel did go into it to the depth of a foot, and another that his horse was frightened at it. Held, that evidence of this kind was plainly admissible, as showing the circumstances which called attention to the hole. *Tomlinson v. Derby*, 43 Conn. 565.

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Authorities.—*Durkee v. India Mut. Ins. Co.*, 159 Mass. 514, 34 N. E. 1133; *Smith v. N. Y. & N. E. R. R. Co.*, 163 Mass. 569, 41 N. E. 110; *Elliott v. Lyman*, 3 Allen, 110; *Kelliher v. Miller*, 97

Mass. 71; *Howe v. Weymouth*, 155 Mass. 439, 29 N. E. 646; *Howe v. Whitehead*, 130 Mass. 268; *Gahagan v. Boston, etc., R. R. Co.*, 1 Allen, 187, 79 Am. Dec. 724; *Dana v. Nat. Bank of Republic*, 132 Mass. 156.

Instances.—The fact that a person sold proper goods to A does not, in itself, tend to prove that he sold proper goods to B, and is inadmissible. *Lake v. Clark*, 97 Mass. 346.

It is admissible in connection with the fact that the two sets of goods were alike. *Pike v. Fay*, 101 Mass. 134.

The question is whether A, a landlord, was liable in damages to B, his tenant, for personal injuries sustained by reason of a defect in a set of wooden steps belonging to the tenement. The fact that C had fallen on the same steps in the same manner, before the accident to B, is irrelevant. *Dean v. Murphy*, 169 Mass. 413, 48 N. E. 283.

The question is, whether A and B are jointly interested in trading in cattle. The fact that A and B were jointly interested in trading in horses is irrelevant. *Farnum v. Farnum*, 13 Gray, 508.

In an action involving the question whether a certain loom attachment worked successfully, it is competent to show that it worked properly on another loom, evidence having previously been introduced that the two looms were alike. The similarity of the looms presented a question to be passed upon ultimately by the jury. *Brierly v. Mills*, 128 Mass. 291.

Similar crimes, etc.—The fact that the accused has committed similar frauds or crimes is incompetent. *Jordan v. Osgood*, 109 Mass. 457; *Costelo v. Crowell*, 139 Mass. 588; *Com. v. Call*, 21 Pick. 522; *Com. v. Wilson*, 2 Cush. 590; *Com. v. Campbell*, 7 Allen, 541, 83 Am. Dec. 705; *Jordan v. Osgood*, 109 Mass. 457; *Com. v. Jackson*, 132 Mass. 16, 19, 44 Am. Rep. 299, note; *Miller v. Curtis*, 158 Mass. 129.

Evidence of negligence on previous occasions is not admissible in suits for negligence. *Robinson v. Fitchburg & W. R. R. Co.*, 7 Gray, 92; *Maguire v. Middlesex R. R. Co.*, 115 Mass. 239; *Whitney v. Gross*, 140 Mass. 232; *Lane v. Boston & Albany R. R. Co.*, 112 Mass. 455.

Highway injuries.—In suits for injuries on the highway, evidence as to the condition of the road about the same time, a short distance from the exact spot, is admissible. *Collins v. Dorchester*, 6 Cush. 396.

Value.—Evidence as to sales of similar property is admissible on the question of value. *Haven v. County Comrs.*, 155 Mass. 467; *Pierce v. Boston*, 164 Mass. 92; *Lyman v. Boston*, 164 Mass. 99; *Bowditch v. Boston*, 164 Mass. 107; *Newsome v. Davis*, 133 Mass. 343.

The opinion of an expert as to the value of other land in the vicinity is irrelevant. *Beale v. Boston*, 166 Mass. 53.

In order to render the selling price of goods admissible, to prove the value of others, the similarity of the two lots must be established. *Haven v. County Comrs.*, 155 Mass. 467; *Berney v. Dinsmore*, 141 Mass. 42.

But an unaccepted offer to purchase or sell is irrelevant. *Winnisimmet Co. v. Grueby*, 111 Mass. 543; *Wood v. Ins. Co.*, 126 Mass. 316; *Davis v. Charles River Branch R. R. Co.*, 11 Cush. 506.

And the valuation of an assessor is irrelevant. *Thompson v. Boston*, 148 Mass. 387; *Anthony v. R. R. Co.*, 162 Mass. 60, 37 N. E. 780.

A witness as to the value of land, before expressing an opinion as to its value, should show that he is familiar with sales of similar property and the prices paid therefor. *Cochrane v. Commonwealth*, 175 Mass. 299, 56 N. E. 610; *Phillips v. Marblehead*, 148 Mass. 326, 19 N. E. 547.

ARTICLE 11.*

ACTS SHOWING INTENTION, GOOD FAITH, ETC.

When there is a question whether a person said or did something, the fact that he said or did something of the same sort on a different occasion may be proved if it shows the existence on the occasion in question of any intention, knowledge, good or bad faith, malice, or other state of mind or of any state of body or bodily feeling, the existence of which is in issue or is or is deemed to be relevant to the issue; but such acts or words may not be proved merely in order to show that the person so acting or speaking was likely on the occasion in question to act in a similar manner.

⁴ Where proceedings are taken against any person for having received goods, knowing them to be stolen, or for

* See Note VI.

⁴ 34 & 35 Vict. c. 112, s. 19 (language slightly modified). This enactment overrules to a strictly limited extent *R. v. Oddy*, 1851, 2

having in his possession stolen property, the fact that there was found in the possession of such person other property stolen within the preceding period of twelve months, is deemed to be relevant to the question whether he knew the property to be stolen which forms the subject of the proceedings taken against him.

If, in the case of such proceedings as aforesaid, evidence has been given that the stolen property has been found in the possession of the person proceeded against, the fact that such person has within five years immediately preceding been convicted of any offence involving fraud or dishonesty, is deemed to be relevant for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen, and may be proved at any stage of the proceedings: provided that not less than seven days' notice in writing has been given to the person accused that proof is intended to be given of such previous conviction.

The fact that the prisoner was within twelve months in possession of other stolen property than that to which the charge applies, is not deemed to be relevant, unless such property was found in his possession at or soon after the time when the proceedings against him were taken.⁵

Illustrations.

(a) A is charged with receiving two pieces of silk from B, knowing them to have been stolen by him from C.

Den. C. C. 264, and practically supersedes *R. v. Dunn*, 1826, 1 Moo. C. C. at p. 150, and *R. v. Davis*, 1833, 6 C. & P. 177. See Illustrations.

⁵ *R. v. Carter*, 1884, 12 Q. B. D. 522; and see *R. v. Drage*, 1878, 14 Cox, C. C. 85.

The facts that A received from B many other articles stolen by him from C in the course of several months, and that A pledged all of them, are deemed to be relevant to the fact that A knew that the two pieces of silk were stolen by B from C.⁶

(b) A is charged with uttering, on the 12th December, 1854, a counterfeit crown piece, knowing it to be counterfeit.

The facts that A uttered another counterfeit crown piece on the 11th December, 1854, and a counterfeit shilling on the 4th January, 1855, are deemed to be relevant to show A's knowledge that the crown piece uttered on the 12th was counterfeit.⁷

(c) A is charged with attempting to obtain money by false pretences, by trying to pledge to B a worthless ring as a diamond ring.

The facts that two days before, A tried, on two separate occasions, to obtain money from C and D respectively, by a similar assertion as to the same or a similar ring, and that on another occasion on the same day he obtained a sum of money from E by pledging as a gold chain a chain which was only gilt, are deemed to be relevant, as showing his knowledge of the quality of the ring.⁸

(d) A is charged with obtaining eggs from B by falsely pretending that he was carrying on a real business as a farmer or dairyman.

The fact that on subsequent occasions he had obtained eggs from C and D by means of the same pretence is deemed to be relevant, as showing that he was not carrying on a real business.⁹

(e) A is charged with obtaining money from B by falsely pretending that Z had authorised him to do so.

The fact that on a different occasion A obtained money from C by a similar false pretence is deemed to be irrelevant,¹⁰ as A's knowledge that he had no authority from Z on the second occasion had no connection with his knowledge that he had no authority from Z on the first occasion.

⁶ *R. v. Dunn*, 1826, 1 Moo. C. C. 146.

⁷ *R. v. Forster*, 1855, Dear. 456; and see *R. v. Weeks*, 1861, L. & C. 18.

⁸ *R. v. Francis*, 1874, L. R. 2 C. C. R. 128. The case of *R. v. Cooper*, 1875, 1 Q. B. D. (C. C. R.) 19, is similar to *R. v. Francis*, and perhaps stronger.

⁹ *R. v. Rhodes*, [1899], 1 Q. B. 77. See, too, *R. v. Neill*, *post*, p. 55, note 23.

¹⁰ *R. v. Holt*, 1860, Bell, C. C. 280; and see *R. v. Francis*, *ub. sup.* p. 130.

(f) A sues B for damage done by a dog of B's which B knew to be ferocious.

The facts that the dog had previously bitten X, Y, and Z, and that they had made complaints to B, are deemed to be relevant.¹¹

(g) The question is, whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee, if the payee had been a real person, is deemed to be relevant, as showing that A knew that the payee was a fictitious person.¹²

(h) A sues B for a malicious libel. Defamatory statements made by B regarding A for ten years before those in respect of which the action is brought are deemed to be relevant to show malice.¹³

(i) A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent, suffered loss.

The fact that, at the time when A represented C to be solvent, C, was to A's knowledge supposed to be solvent by his neighbours and by persons dealing with him, is deemed to be relevant, as showing that A made the representation in good faith.¹⁴

(j) A is sued by B for the price of work done by B, by the order of C, a contractor, upon a house, of which A is owner.

A's defence is that B's contract was with C.

The fact that A paid C for the work in question is deemed to be relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.¹⁵

(k) A is accused of stealing property which he had found, and the question is, whether he meant to steal it when he took possession of it.

The fact that public notice of the loss of the property had been given in the place where A was, and in such a manner that A knew or probably might have known of it, is deemed to be relevant, as showing that A did not, when he took possession of it, in good faith believe that the real owner of the property could not be found.¹⁶

¹¹ See cases collected in Roscoe's *Nisi Prius*, 748.

¹² *Gibson v. Hunter*, 1794, 2 H. Bl. 288.

¹³ *Barrett v. Long*, 1851, 3 H. L. C. 395, at p. 414.

¹⁴ *Sheen v. Bumpstead*, 1863, 2 H. & C. 193.

¹⁵ *Gerish v. Charlier*, 1845, 1 C. B. 13.

¹⁶ This illustration is adapted from *Preston's Case*, 1851, 2 Den.

(l) The question is, whether A is entitled to damages from B, the seducer of A's wife.

The fact that A's wife wrote affectionate letters to A before the adultery was committed, is deemed to be relevant, as showing the terms on which they lived and the damage which A sustained.¹⁷

(m) The question is, whether A's death was caused by poison.

Statements made by A before his illness as to his state of health, and during his illness as to his symptoms, are deemed to be relevant facts.¹⁸

(n) The question is, what was the state of A's health at the time when an insurance on her life was effected by B.

Statements made by A as to the state of her health at or near the time in question are deemed to be relevant facts.¹⁹

(o) The question is, whether A, the captain of a ship, knew that a port was blockaded.

The fact that the blockade was notified in the Gazette is deemed to be relevant.²⁰

AMERICAN NOTE.

GENERAL.

(See also note to Article 12.)

Authorities.—Taylor on Evidence (Chamberlayne's 9th ed.), p. 257⁶; Greenleaf on Evidence (15th ed.), sec. 53, note; Abbott's Trial Evidence, p. 342; *Nichols v. Baker*, 75 Me. 334; *Conant v. Leslie*, 85 Me. 257; *Hovey v. Grant*, 52 N. H. 569; *Adams v. Kenney*, 59 N. H. 133; *State v. Palmer*, 65 N. H. 216, 20 Atl. 6; *State v. McDonald*, 14 R. I. 270; *State v. Fitzsimon*, 18 R. I. 236, 27 Atl. 446; *State v. Habib*, 18 R. I. 558, 30 Atl. 462; *State v. Kelley*, 65 Vt. 531; *Fratini v. Caslini*, 66 Vt. 273; *Limerick Nat. Bank v. Adams*, 70 Vt. 133, 40 Atl. 166; *State v. Hallock*, 70 Vt. 159, 40 Atl. 51.

The second, third, and fourth paragraphs of the text, as appears from the notes, are statutory and have no application to this country.

C. C. 353; but the misdirection given in that case is set right. As to the relevancy of the fact, see in particular Lord Campbell's remark on p. 359.

¹⁷ *Trelawny v. Coleman*, 1817, 1 B. & Ald. 90.

¹⁸ *R. v. Palmer*, 1856. See my 'Gen. View of Crim. Law,' pp. 238, 256 (evidence of Dr. Savage and Mr. Stephens).

¹⁹ *Aveson v. Lord Kinnaird*, 1805, 6 Ea. 188.

²⁰ *Harra v. Wise*, 1829, 9 B. & C. 712.

Intent.—A is charged with illegally keeping liquors for sale. The fact that nearly three months prior to the complaint and seizure in question A had been convicted, on a plea of *nolo contendere*, of illegally keeping liquors, is relevant to show intent. *State v. Plunkett*, 64 Me. 534.

Upon an issue of whether A, by the use of fraudulent representations, purchased property from B, the fact that about the same time of the transaction in question A had fraudulently dealt with B, is relevant. *Pierce v. Hoffman*, 24 Vt. 525.

Upon the question of whether A, a depositor and client of a bank, had been misused or wronged by B, its cashier, the fact that other depositors had been misused or wronged by B is irrelevant. *Whitney v. First Nat. Bank*, 55 Vt. 154, 45 Am. Dec. 598.

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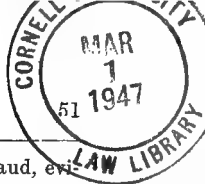
Where fraud is imputed, a considerable latitude must be allowed in the admission of evidence. *Howie v. Home Ins. Co.*, 32 Conn. 37. See *Goodwin v. U. S. Annuity Co.*, 24 Conn. 602.

If an insolvent debtor simultaneously conveys all his estate by several deeds to different relatives, all the deeds are admissible to raise a presumption of fraud, in an action to set aside any one of them. *Thomas v. Beck*, 39 Conn. 243.

In an action of trover the plaintiff claimed that the defendant had conspired with other persons to obtain the goods in question from him by fraudulent representations. Held, that evidence of similar fraudulent representations by the same parties to a stranger, made in order to procure goods from him, was admissible to show the character of the representations made to the plaintiff. *Luckey v. Roberts*, 25 Conn. 492.

In a prosecution for keeping liquors with intent to sell the same, the State offered evidence of sales made by the defendant, before the date of the alleged offense. Held, that it was admissible on the question of intent, although other prosecutions for such sales were pending against him. *State v. Raymond*, 24 Conn. 206.

In an action against A, B, and C, for a conspiracy to defraud such merchants as they could, by representing A, who was a bankrupt, to be a man of large property and safely to be trusted, evidence is admissible that the defendants made such representations to certain third parties, in consequence of which the latter, without the request of the defendants, recommended A to the plaintiff, whereby he was induced to give him credit. *Gardner v. Preston*, 2 Day, 210.



The cases where, for the purpose of proving a particular fraud, evidence of other similar fraudulent transactions is admissible, are confined to cases of a conspiracy to commit fraud. *Edwards v. Warner*, 35 Conn. 518, 519.

Evidence, therefore, that the defendant has defrauded others in a particular way, in certain transactions, is not admissible to show that he designed to defraud the plaintiff in the same way, in a similar transaction. *Edwards v. Warner*, 35 Conn. 519.

The object of such evidence is to show,—first, the fact of a conspiracy of the defendant with others to commit frauds similar to the particular fraud charged; and, second, as an inference, that the particular fraud charged was a part of the same conspiracy. *Edwards v. Warner*, 35 Conn. 519.

In an action on a policy of marine insurance by a mortgagee,—Held, that to show that the plaintiff insured his interest with the fraudulent design of afterwards procuring the loss of the vessel, the defendants might show a series of losses, under suspicious circumstances, of other vessels owned by the same parties, and mortgaged to and insured by the plaintiff. *Howie v. Home Ins. Co.*, 32 Conn. 37. See *Thompson v. Rose*, 16 Conn. 81; *Clark v. Johnson*, 5 Day, 379.

In an action on a note by an indorsee,—Held, that to prove that the note was obtained by conspiracy and fraud, and taken by the plaintiff with notice, the defendant might show that twenty other notes were obtained at about the same time from twenty other parties, by the same payee, by means of a similar fraud, perpetrated by two parties, all of which notes were brought up at a great discount, in one lot, by the plaintiff, from one of the conspirators. *Knotwell v. Blanchard*, 41 Conn. 616; *Tyler v. Todd*, 36 Conn. 218.

Evidence that the defendant has been guilty of other like frauds is never admissible for the purpose of showing his bad character, and the greater probability, on that account, of his having committed the particular fraud charged. *Edwards v. Warner*, 35 Conn. 519.

In an action against the indorser of a note, on the ground that, though the indorsement was a forgery, yet he had made it his own, the plaintiff proved that the defendant's name had been forged on other notes discounted at the bank, of which he had notice. Held, that the defendant could not be allowed to show the names of third parties had been forged under similar circumstances, of which they had had notice. *Hartford Bank v. Hart*, 3 Day, 493.

To an action against an indorser, the defense was that the note was one of some fifty bearing forged indorsements, put out by the same

maker, in confederacy with third parties, and the defendant testified that that number of notes had gone to protest, of which only one bore his genuine indorsement. Held, that, in connection with this, he might state that he had received from different banks fifty notices of protests of notes of this same maker, purporting to bear his indorsement, within a few months, and also give the amounts of the notes. Such a defense justifies considerable latitude of inquiry. *Tyler v. Todd*, 36 Conn. 220.

Under a declaration in trespass against two for a joint assault, the plaintiff, having proved an assault by one of the defendants, offered evidence of a subsequent assault by the other, a few hours later, claiming that they were both parts of a plot concerted between the defendants to get her out of her house. Held, that the court acted correctly in admitting the evidence, and directing the jury that while but one assault could be proved, yet all the testimony offered might be considered by them, if they found such a concerted plot as was claimed by the plaintiff, and that both the assaults were committed in furtherance of it. *Brown v. Wheeler*, 18 Conn. 205.

In a suit to set aside conveyances by a husband to his wife, as being fraudulent, the wife testified in her own behalf that she had no knowledge that her husband was in embarrassed circumstances, and knew nothing about his business or of any intent to defraud creditors. Held, that, as bearing on this question of knowledge, she might properly be inquired of on cross-examination respecting transfers of other real estate made to her by her husband about a year previous. *Trumbull v. Hewitt*, 65 Conn. 60.

On the trial of one charged with passing counterfeit coin, to show his guilty knowledge, evidence is admissible that he had, at the same time, in his possession other similar counterfeit coins. *Stalker v. State*, 9 Conn. 343.

On an information against one for trafficking in foreign goods as a peddler, etc., evidence is admissible that, on previous occasions to that regarding which the complaint is made, the defendant trafficked with other parties, as a peddler,—to show the character of his acts. *Merriam v. Langdon*, 10 Conn. 468, 469.

Evidence is also admissible of his selling to other parties from the same load of goods seized, and for trafficking in which the information was filed, other foreign goods of a different description from any specified in the information; since his selling a part affords a presumption that the whole wagon-load was on sale. *Merriam v. Langdon*, 10 Conn. 469.

To prove guilty knowledge on the part of receiver of stolen goods, it may be proved that he had before received stolen goods from the same person. *State v. Ward*, 49 Conn. 440.

It is not necessary that the goods before received should have been stolen from the same person, nor be of the same character. *State v. Ward*, 49 Conn. 441, 442.

Proof of a combination or conspiracy for a criminal purpose is not often made by direct, open and positive evidence, but more generally and more naturally by proving a repetition of acts of a character conducing to show a mutual purpose. In such cases it is seldom true that any one act, taken by itself, can be detected as tending to prove a combination, but when it is seen in connection with other acts, its true nature may be discovered. *State v. Spalding*, 19 Conn. 237. See also *Stalker v. State*, 9 Conn. 341.

Inadmissible to show was likely to so act.—As authorities for the last proposition of the text see *State v. Bates*, 10 Conn. 373; *Edwards v. Warner*, 35 Conn. 517.

MASSACHUSETTS.

Intention, etc.—*Com. v. Stoehr*, 109 Mass. 365; *Com. v. Dearborn*, 109 Mass. 368; *Com. v. Kelley*, 116 Mass. 341.

A is charged with embezzlement from B. The fact that, within the same week when the embezzlement charged took place, A had previously embezzled from B, is relevant to the intent of A, relative to the offense charged. *Com. v. Shepard*, 1 Allen, 575.

Likely to so act.—A is charged with larceny. The fact that A had told an officer of the law, in the course of conversations, much concerning other crimes committed by him, is irrelevant to show that A, by reason of being a notorious thief, was likely to steal on the occasion in question. *Com. v. Campbell*, 155 Mass. 537.

ARTICLE 12.*

FACTS SHOWING SYSTEM.

When there is a question whether an act was accidental or intentional, the fact that such act formed part of a series

* See Note VI.

of similar occurrences, in each of which the person doing the act was concerned, is deemed to be relevant.

Illustrations.

(a) A is accused of setting fire to his house in order to obtain money for which it is insured.

The facts that A had previously lived in two other houses successively, each of which he insured, in each of which a fire occurred, and that after each of those fires A received payment from a different insurance office, are deemed to be relevant, as tending to show that the fires were not accidental.²¹

(b) A is employed to pay the wages of B's labourers, and it is A's duty to make entries in a book showing the amounts paid by him. He makes an entry showing that on a particular occasion he paid more than he really did pay.

The question is, whether this false entry was accidental or intentional.

The fact that for a period of two years A made other similar false entries in the same book, the false entry being in favour of each case in A, is deemed to be relevant.²²

(c) The question is, whether the administration of poison to A, by Z, his wife, in September, 1848, was accidental or intentional.

The facts that B, C, and D (A's three sons), had the same poison administered to them in December, 1848, March, 1849, and April, 1849, and that the meals of all four were prepared by Z, are deemed to

²¹ *R. v. Gray*, 1866, 4 F. & F. 1102. I acted on this case in *R. v. Stanley*, Liverpool Summer Assizes, 1882, but I greatly doubt its authority. The objection to the admission of such evidence is that it may practically involve the trial of several distinct charges at once, as it would be hard to exclude evidence to show that the other fires were accidental.— See, too, *Makin v. The Attorney-General for New South Wales*, [1894], A. C. 57, decided after the author had written the foregoing note, where the judgment in *R. v. Gray* was mentioned without disapproval in the judgment of the Judicial Committee; the decision in this case was that on a charge of murder of a baby, evidence of children's remains being found on premises occupied by the accused was admissible.

²² *R. v. Richardson*, 1860, 2 F. & F. 343.

be relevant, though Z was indicted separately for murdering A, B, and C, and attempting to murder D.²³

(d) A promises to lend money to B on the security of a policy of insurance which B agrees to effect in an insurance company of his choosing. B pays the first premium to the company, but A refuses to lend the money except upon terms which he intends B to reject, and which B rejects accordingly.

The fact that A and the insurance company have been engaged in similar transactions is deemed to be relevant to the question whether the receipt of the money by the company was fraudulent.²⁴

AMERICAN NOTE.

GENERAL.

(See also notes under Article 11.)

Authorities.—1 Taylor on Evidence (Chamberlayne's 9th ed.), p. 257¹⁵; 1 Greenleaf on Evidence (15th ed.), sec. 53, note; *Dearborn v. Union Nat. Bank*, 61 Me. 369; *Ossipee v. Grant*, 59 N. H. 70; *State v. McDonald*, 14 R. I. 270; *McCasker v. Enright*, 64 Vt. 488, 33 Am. St. Rep. 938; *State v. Kelley*, 65 Vt. 531.

CONNECTICUT.

Authority.—*Howie v. Home Ins. Co.*, 32 Conn. 21, 85 Am. Dec. 240.

A bought a vessel, on which he held a mortgage, and insured it with B. The vessel was lost on her next voyage, and A brought suit on the policy of insurance. B claimed that the vessel was fraudulently lost by the master's misconduct, to which A was privy, and that the insurance was fraudulently procured with intent that the vessel should be lost. The fact that a series of losses, under suspicious circumstances, of other vessels owned by one of the same owners, and mortgaged in the same manner to A, has occurred, is relevant to show that the loss

²³ *R. v. Geering*, 1849, 18 L. J. M. C. 215; cf. *R. v. Garner*, 1863, 3 F. & F. 681. See, too, *Makin v. The Attorney-General for New South Wales*, [1894], A. C. 57. The earlier cases were discussed in *R. v. Neill* (or *Cream*), tried at the Central Criminal Court in October, 1892, when Hawkins, J., admitted evidence of subsequent administrations of strychnine by the prisoner to persons other than and unconnected with the woman of whose murder the prisoner was then convicted. See, too, *R. v. Rhodes*, ante, p. 18, note 2.

²⁴ *Blake v. Albion Life Assurance Society*, 1878, 4 C. P. D. 94.

of the vessel in question was not accidental. *Howie v. Home Ins. Co.*, 32 Conn. 21, 85 Am. Dec. 240.

MASSACHUSETTS.

Authorities.— *Com. v. McCarthy*, 119 Mass. 354; *Com. v. Robinson*, 146 Mass. 571, 16 N. E. 152; *Com. v. Eastman*, 1 Cush. 189, 48 Am. Dec. 595; *Com. v. Bradford*, 126 Mass. 42.

ARTICLE 13.*

EXISTENCE OF COURSE OF BUSINESS WHEN DEEMED TO BE
RELEVANT.

When there is a question whether a particular act was done, the existence of any course of office or business according to which it naturally would have been done, is a relevant fact.

When there is a question whether a particular person held a particular public office, the fact that he acted in that office is deemed to be relevant.²⁵

When the question is whether one person acted as agent for another on a particular occasion, the fact that he so acted on other occasions is deemed to be relevant.

Illustrations.

(a) The question is, whether a letter was sent on a given day.

The post-mark upon it is deemed to be a relevant fact.²⁶

(b) The question is, whether a particular letter was despatched.

The facts that all letters put in a certain place were, in the common course of business, carried to the post, and that that particular letter was put in that place, are deemed to be relevant.²⁷

* See Note VII.

²⁵ 1 Ph. Ev. 449; Roscoe's N. P. 43; Taylor, s. 171.

²⁶ *R. v. Canning*, 1754, 19 S. T. 370.

²⁷ *Hetherington v. Kemp*, 1815, 4 Camp. 193; and see *Skilbeck v.*

(c) The question is, whether a particular letter reached A.

The facts that it was posted in due course properly addressed, and was not returned through the Dead Letter Office, are deemed to be relevant.²⁸

(d) The facts stated in illustration (d) to the last article are deemed to be relevant to the question whether A was agent to the company.²⁹

AMERICAN NOTE.

GENERAL.

Authority.—Abbott's Trial Evidence (2d ed.), pp. 52, 237.

Course of business.—*Union Bank v. Stone*, 50 Me. 595, 79 Am. Dec. 631; *Hall v. Brown*, 58 N. H. 93.

The question is, whether notice was given to an indorser of a note upon its dishonor. The testimony of a notary public, alleged to have given such notice, as to his usual course of proceeding and his customary habit of business, in regard to giving notice, is deemed to be relevant. *Union Bank v. Stone*, 50 Me. 595, 79 Am. Dec. 631.

Agency.—*Kent v. Tyson*, 20 N. H. 121; *Perry v. Dwelling-House Ins. Co.*, 67 N. H. 291, 33 Atl. 731, 26 Ins. L. J. 120.

Mailing letter.—Authorities similar to illustration (c). *Inhabitants of Augusta v. Shepard*, 21 Me. (8 Shep.) 298; *Labre v. Smith*, 62 N. H. 663; *Woodman v. Jones*, 8 N. H. 344; *Russell v. Buckley*, 4 R. I. 525, 70 Am. Dec. 167; *Oakes v. Weller*, 16 Vt. 63.

CONNECTICUT.

Course of business.—*Dwight v. Brown*, 9 Conn. 83.

The question is, whether a notice of protest was sent on a given day. The post-mark of the office where it was mailed is deemed to be relevant. *New Haven County Bank v. Mitchell*, 15 Conn. 206.

Holding office.—*State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409.

Mailing letter.—Authorities similar to illustration (c). *Hartford Bank v. Hart*, 3 Day, 491; *Pitts v. Hartford Life & Annuity Ins. Co.*, 66 Conn. 376.

Garbett, 1845, 7 Q. B. 846, and *Trotter v. Maclean*, 1879, 13 Ch. Div. 574.

²⁸ *Warren v. Warren*, 1834, 1 C. M. & R. 250; *Woodcock v. Houldsworth*, 1846, 16 M. & W. 124. Other cases on this subject are collected in Roscoe's *Nisi Prius*, p. 374.

²⁹ *Blake v. Albion Life Assurance Society*, 1878, 4 C. P. D. 94.

MASSACHUSETTS.

Course of business.—*Com. v. Kimball*, 108 Mass. 473; *Holly v. Boston Gaslight Co.*, 8 Gray, 123, 69 Am. Dec. 233; *Briggs v. Hervey*, 130 Mass. 187.

The question is, whether a particular letter reached A. The fact that it was the usage, at a hotel, to deposit all letters, left for the guests, in an urn, whence they were sent, at short intervals during the day, to the rooms of the different guests to whom they were directed, is deemed to be relevant. *Dana v. Kemble*, 19 Pick. 112.

The question is, whether a letter reached A. The facts that B, the alleged sender, took a copy thereof in the course of his business, and in accordance with his custom, by which he would naturally deposit the letter in the post-office, directed and post-paid, are deemed to be relevant. *McKay v. Myers*, 168 Mass. 312, 47 N. E. 98.

The question is, whether a particular telegram reached A.

The facts that it was properly addressed and deposited in the telegraph office, with the charges prepaid, are deemed to be relevant. *Com. v. Jeffries*, 7 Allen, 548, 73 Am. Dec. 712.

Holding office.—*Fowler v. Beebe*, 9 Mass. 231.

Agency.—*Putnam v. Home Ins. Co.*, 123 Mass. 324, 25 Am. Rep. 93; *Doyle v. Corey*, 170 Mass. 337, 49 N. E. 651; *Kelley v. Lindsey*, 7 Gray, 287; *Roche v. Ladd*, 1 Allen, 436.

Mailing letter.—Illustration (c). *Huntley v. Whittier*, 105 Mass. 391, 7 Am. Rep. 536; *Munn v. Baldwin*, 6 Mass. 316; *Hedden v. Roberts*, 134 Mass. 38; *Marston v. Bigelow*, 150 Mass. 45, 22 N. E. 71, 5 L. R. A. 43; *Briggs v. Hervey*, 130 Mass. 186.

CHAPTER IV.

HEARSAY IRRELEVANT EXCEPT IN CERTAIN CASES.

ARTICLE 14.*

HEARSAY AND THE CONTENTS OF DOCUMENTS IRRELEVANT.

(a) THE fact that a statement was made by a person not called as a witness, and

(b) the fact that a statement is contained or recorded in any book, document, or record whatever, proof of which is not admissible on other grounds,

are respectively deemed to be irrelevant to the truth of the matter stated, except (as regards (a)) in the cases contained in the first section of this chapter;¹

and except (as regards (b)) in the cases contained in the second section of this chapter.

Illustrations.

(a) A declaration by a deceased attesting witness to a deed that he had forged it, is deemed to be irrelevant to the question of its validity.²

* See Note VIII.

¹ It is important to observe the distinction between the principles which regulate the admissibility of the statements contained in a document and those which regulate the manner in which they must be proved. On this subject see the whole of Part II.

² *Stobart v. Dryden*, 1836, 1 M. & W. 615.

(b) The question is, whether A was born at a certain time and place. The fact that a public body for a public purpose stated that he was born at that time and place is deemed to be irrelevant, the circumstances not being such as to bring the case within the provisions of Article 34.³

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), sec. 99; McKelvey on Evidence, p. 203.

Hearsay inadmissible.—Authorities on the first clause of the text. *In re Hurlburt's Estate*, 68 Vt. 366, 35 Atl. 77; *Quinnam v. Quinnam*, 71 Me. 179; *Sidelinger v. Bucklin*, 64 Me. 371; *Chapman v. Twitchell*, 37 Me. 59, 58 Am. Dec. 773; *Sheldon v. Robinson*, 7 N. H. 157, 26 Am. Dec. 726; *Rose v. Mitchell*, 21 R. I. 270, 43 Atl. 67.

Instances.—The question is, whether A made a promise of marriage to B.

The declarations of A's mother, to the plaintiff, B, made in A's absence, and not communicated to him, are deemed irrelevant either as tending to prove the alleged promise on the part of A, the defendant, or that on the part of B. *Lawrence v. Cooke*, 56 Me. 187, 96 Am. Dec. 443.

The declarations of deceased persons, who had means of knowledge and were disinterested, are deemed irrelevant in relation to acts of ownership or possession on the part of A. *Wendell v. Abbott*, 45 N. H. 349.

The question is, what was the boundary line between the property of A and of B, and what was the location of a certain corner therein.

The fact that on a survey of the line by C, a witness, the plaintiff's brother, D, was present, and did not object to his taking the corner to be at the place where the defendant, B, claimed it to be, is deemed to be irrelevant as against A, the plaintiff. *Johnson v. Prescott*, 67 N. H. 597, 32 Atl. 775.

The question is, whether a warranty that a horse "would work well" had been broken.

The fact that a horse trainer, not called as a witness, had offered to subdue the horse for the plaintiff, A, for a certain sum, but that A declined to employ him, is irrelevant and hearsay. *Gates v. Moore*, 51 Vt. 222.

³ *Sturla v. Freccia*, 1880, 5 App. Cas. 623.

The question is, whether a certain dog was vicious in biting A, who brought an action against his master, B, for damages resulting from the bite.

The fact that A, upon dropping into a drowse, would jump up and call, "Take him off," that the dog was biting him, is deemed irrelevant. *Plummer v. Ricker*, 71 Vt. 114, 41 Atl. 1045.

Written hearsay inadmissible.—Authorities on the second clause of the text. *Kimball v. Hilton*, 92 Me. 214, 42 Atl. 394; *Ordway v. Haynes*, 50 N. H. 159; *State v. O'Brien*, 7 R. I. 336; *Hibbard v. Mills*, 46 Vt. 243.

The question is, what were the terms of a contract made upon a particular occasion by A, the agent of B, with C.

A letter to B, from A, relative to the contract which A proposes to make, is irrelevant to prove the contract, being a mere declaration out of court. *Sargent v. Wording*, 46 Me. 464.

In a suit by A, for the alienation of his wife's affections, the question is, why B, the wife, remained away from her husband, A.

A declaration and petition for divorce on the ground of adultery, offered in evidence by A, are irrelevant when B, the wife, testifies that she left him because of cruel treatment, but does not claim that she stayed away because of unjust charges. *Rose v. Mitchell*, 21 R. I. 270, 21 R. I. (part 2) 60, 43 Atl. 67.

CONNECTICUT.

Hearsay inadmissible.—Authorities for the first clause of the text: *Cook v. Osborn*, 2 Root, 31; *Baxter v. Camp*, 71 Conn. 245, 41 Atl. 803, 42 L. R. A. 514; *Brown v. Butler*, 71 Conn. 576, 42 Atl. 654; *Porter v. Rich*, 70 Conn. 235; *Allen v. Rundle*, 50 Conn. 24; *Strong v. Smith*, 62 Conn. 43; *Benton v. Starr*, 58 Conn. 288, 290.

Instances.—The question is, whether A, a deceased person, was insane.

Evidence of what his widow, B, had said in relation to his insanity is deemed irrelevant. *Cook v. Osborn*, 2 Root, 31.

The question is, whether a reconveyance of land from B to A was valid as against C, the plaintiff in an ejectment suit against A.

Declarations of B, made to C out of court, showing that the deed from A to B was *bona fide*, being intended as security for responsibilities incurred by B for A, and a writing of defeasance was simultaneously given back are deemed irrelevant. *Chapin v. Pease*, 10 Conn. 69, 25 Am. Dec. 56.

Written hearsay inadmissible.— Authorities on the second clause of the text: *Abel v. Fitch*, 20 Conn. 90, 96; *Bucknam v. Barnum*, 15 Conn. 67; *Allen's Appeal*, 69 Conn. 702, 708, 38 Atl. 701; *Hammond v. Hammond Buckle Co.*, 72 Conn. 130, 139, 44 Atl. 25; *Roraback v. Pennsylvania Coal Co.*, 58 Conn. 292; *Union v. Plainfield*, 39 Conn. 563.

Instance.— The question is, whether A was employed by B, a corporation, as treasurer and general manager.

An extract from the annual report of C, president of this corporation, containing a statement that A is "now the manager," is irrelevant. *Hammond v. Hammond Buckle Co.*, 72 Conn. 130, 44 Atl. 25.

MASSACHUSETTS.

Hearsay inadmissible.— Authorities for the first clause of the text: *McKinnon v. Norcross*, 148 Mass. 533, 30 N. E. 183; *Ryan v. Merriam*, 4 Allen (86 Mass.) 77.

Instances.— The question is, whether an injury was occasioned by A.

The reasons given by guests of an inn for leaving it when offered in testimony as declarations to B, a witness, are irrelevant as to the question in controversy. *Wesson v. Washburn Iron Co.*, 13 Allen (95 Mass.) 95, 90 Am. Dec. 181.

The question is, how a certain accident happened, whereby A, an employee, was injured.

Testimony of a conversation with B, a foreman, in which B told how the accident to A, the plaintiff, happened, is irrelevant. *McKinnon v. Norcross*, 148 Mass. 533, 20 N. E. 183.

Written hearsay inadmissible.— Authorities for the second clause of the text: *Caron v. B. & A. R. R. Co.*, 167 Mass. 72; *Prescott v. Ward*, 10 Allen, 203.

Instances.— The question is, what was the fair cash value of certain shares of stock.

Quotations in newspapers, obtained from persons who might have been summoned as witnesses, are deemed irrelevant, being hearsay. *National Bank of Commerce v. New Bedford*, 175 Mass. 257, 56 N. E. 288. See *Laurent v. Vaughn*, 30 Vt. 90, 94, 95; *Whelan v. Lynch*, 60 N. Y. 469, 474.

SECTION I.

HEARSAY WHEN RELEVANT.

ARTICLE 15.*

ADMISSION DEFINED.

An admission is a statement oral or written, suggesting any inference as to any fact in issue or relevant or deemed to be relevant to any such fact, made by or on behalf of any party to any proceeding. Every admission is (subject to the rules hereinafter stated) deemed to be a relevant fact as against the person by or on whose behalf it is made, but not in his favour unless it is or is deemed to be relevant for some other reason.

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), secs. 169 *et seq.*, 192; McKelvey on Evidence, pp. 90 *et seq.*, 104.

Admissions competent evidence.—As supporting the text, see *Cole v. Cole*, 33 Me. 542; *Wilkinson v. Drew*, 75 Me. 360; *Hamblett v. Hamblett*, 6 N. H. 333; *Olney v. Chadsey*, 7 R. I. 224.

Instances.—The question is, whether the title in a particular piece of property was vested in A, by virtue of being derived from B, A's father, or not.

The fact that C, the grantor of the plaintiff, D, when he bought this property for a home for A's mother, E, said to her: "You have got a good home as long as you live by paying the taxes, insurance,

* See Note IX.

and keeping the house in repair,' to which statement it did not appear that L, the mother of A, the defendant, made any reply, is an admission, implied by her silence, that D's grantor, C, was the owner of the property, and in affirmance of C's title, and is relevant to the question in controversy. *Roberts v. Rice*, 69 N. H. 472, 45 Atl. 237.

The question is, whether A, a driver employed by B, was careless or incompetent in the overturning of a carriage driven by A, whereby C was injured.

The fact that immediately after the accident A was discharged by his master, B, is competent evidence as an admission that A was careless or incompetent. *Martin v. Towle*, 59 N. H. 31.

The declaration of B, that "he wished to God it had burned the whole of it," deemed to be relevant as an admission in an action brought by A against B for a loss sustained by a fire negligently set to A's grove. *Wilkinson v. Drew*, 75 Me. 360.

The question is, whether or not A was worth \$600 at a given time.

The fact that at that time A rated his property to the assessors at \$600 is deemed to be relevant as an admission. *Richardson v. Hitchcock*, 28 Vt. 757.

Compromises.—Offers of compromise are not admissible. *Greenfield v. Kennett*, 69 N. H. 419, 45 Atl. 233; *Daniels v. Woonsocket*, 11 R. I. 4, 39 N. E. 644; *Webber v. Dunn*, 71 Me. 331.

But admissions of facts in the course of conversations with reference to compromise are admissible. *Beaudette v. Gagne*, 87 Me. 534, 33 Atl. 23; *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143, 82 Am. Dec. 201; *Jenness v. Jones*, 44 Atl. (N. H.) 607; *Stanford v. Bates*, 22 Vt. 546; *Doon v. Rovey*, 49 Vt. 293; *Chickering v. Brooks*, 61 Vt. 554, 18 Atl. 144.

CONNECTICUT.

Admissions competent evidence.—*Crowley v. Pendleton*, 46 Conn. 64; *Saunders' Appeal*, 54 Conn. 108; *Broschart v. Tuttle*, 59 Conn. 1, 21 Atl. 925, 11 L. R. A. 9, 33; *Electric Motor Co. v. D. Frisbie Co.*, 66 Conn. 67; *Carney v. Hennessey*, 73 Conn., 49 Atl. 910.

Compromises.—Offers of compromise are not admissible. *Fowles v. Allen*, 64 Conn. 351.

But admissions of facts in the course of conversations with reference to compromise are admissible. *Hartford Bridge Co. v. Granger*, 4 Conn. 148; *Fuller v. Hampton*, 5 Conn. 426; *Howard Ins. Co. v. Hope Mut. Ins. Co.*, 22 Conn. 403; *Broschart v. Tuttle*, 59 Conn. 24; *Bassett v. Shares*, 63 Conn. 44.

A party is not estopped by an admission made in ignorance of his rights, induced by an innocent mistake of material facts. *Clinton v. Haddam*, 50 Conn. 87.

Instances.— In an action brought by A against B, her husband, for a divorce, because of ill-treatment of her by B, the testimony of C, that B had stated to him that he had ill-treated his wife, A, is deemed to be revelant as an admission. *Morehouse v. Morehouse*, 70 Conn. 420, 39 Atl. 516.

The mere absence of declarations of a party in favor of his own title cannot be shown by the adverse party against him. *Saugatuck Cong. Society v. East Saugatuck School Dist.*, 53 Conn. 481.

Answers in former actions may be introduced as admissions. *Miles v. Strong*, 68 Conn. 273.

In an action for an assault upon a woman, a witness testified that, about dusk, the defendant came into the keeping-room adjoining the bedroom where the plaintiff was sitting, tending a little child, and asked for a newspaper; that the plaintiff directed her daughter to go and get a light; that the defendant then went into the bedroom and said something to the child; that, soon after, the plaintiff spoke up and said: "Let go of me—Keep your hands off of me—Keep your distance;" and that then, while the daughter was coming in with a light, the defendant left the bedroom, and, soon after, the house. The witness was where he could hear what passed, but could not be seen. Held, that all the evidence was admissible, the plaintiff's exclamations being an accusation of the defendant to his face, which he did not deny or resent. *Stratton v. Nichols*, 20 Conn. 231.

The record of testimony, given before a Probate Court by one charged with concealing goods of a deceased person, may be read as evidence against him in a subsequent suit by the executors; but the whole must be taken together. *Benedict v. Nichols*, 1 Root, 434.

In a civil action for an assault, the defendant's confessions, made on the trial of a criminal prosecution against him for the same assault, are admissible. *Eno v. Brown*, 1 Root, 528.

In a suit against the owner of a cart, which was upset by a trespasser in the highway, forming an obstruction to travel, whereby the plaintiff received an injury, held, that evidence was admissible that the defendant declared, before the injury, that he did not mean to remove the cart until somebody got injured, and that he would not touch it if half the town got killed; since this went to show his

knowledge of the obstruction and his recklessness. *Linsley v. Bushnell*, 15 Conn. 235.

A creditor, having forwarded his bill to the debtor, and received no reply, wrote to him, mentioning these facts, and requesting to be informed as to the prospect of his being able to pay it. The debtor replied to this, that he was extremely sorry to say that, at present, he was wholly unable to pay the demands against him. Held, that this was an admission that he had received the bill, and that it was due, as rendered. *De Forest v. Hunt*, 8 Conn. 183, 184.

The parties were at issue as to whether a payment was intended to apply to a particular note. Held, that a letter from the creditor to the debtor at the time of such payment, showing how the money had been applied, was, in connection with the debtor's failure to object to such application, admissible in support of the contention of the creditor. *Sweeney v. Pratt*, 70 Conn. 274.

As to whether the price at which a plaintiff offered a horse for an injury to which suit is brought, is admissible against him, *quære*. *Bassett v. Shares*, 63 Conn. 46.

In a prosecution under the statute (General Statutes, sec. 3402) for neglect to support a wife, it was held, that the defendant's acknowledgment of the fact of the marriage was admissible against him. *State v. Schweitzer*, 57 Conn. 538.

In an action by two, as partners, against A for goods furnished to another, evidence was offered to show that a bill made out against A, in the name of the plaintiffs, was shown to him twice, and that he disputed only one item, and promised to pay the bill as soon as convenient. Held, that it was rightly admitted to show that he considered the debt as his own, and as due to the firm. *Loomis v. Smith*, 17 Conn. 119.

In an action of ejectment, the defendant corporation, of which the plaintiff was a member, claimed title under a deed from him, the delivery of which he denied. Held, that they might prove votes, which were either passed at meetings of the school district, at which he was present, or which were subsequently communicated to him, without any expression of dissent from him, showing a claim by the district under the deed. *Waller v. Eleventh School Dist.*, 22 Conn. 331.

An admission by one formerly in the military service, that he deserted, is inadmissible to prove his desertion against him. The official record is the only proper evidence. *Terrell v. Colebrook*, 35 Conn. 190.

Where the defendant was charged with having slanderously im-

puted to the plaintiff the paternity of a child, it was held, that a written agreement entered into secretly by the defendant with the selectmen, for support, which the court regarded as not of the nature of a compromise, was admissible as tending to prove that the defendant was the father. *Page v. Merwin*, 54 Conn. 435, 436.

Declarations of a lessee are admissible against him to show that a building which he has put up was meant to be a part of the realty. *Linahan v. Barr*, 41 Conn. 473.

To disprove the defendant's claim of a right of way by prescription, evidence was offered of his declarations, made during the fifteen years through which he now claimed an adverse user, that he used the way by the plaintiff's license. Held, that the testimony was admissible. *Pierce v. Selleck*, 18 Conn. 332.

To show that a man's income was not so great as he represented it, evidence is admissible that he returned an income list for a much less sum. *Bradbury v. Bardin*, 35 Conn. 582.

On an appeal from a board of relief, taken by a wife with her husband, the husband prosecuting the appeal after her death, testified that a piece of land of seven acres, assessed at \$280, was worth only \$105. Held, that the town could show that the wife asked \$75 an acre. *White v. Portland*, 63 Conn. 25.

Assertions of the defendant which refer to his ability, by improper influences, to divide the jury, are admissible against him. *Broschart v. Tuttle*, 59 Conn. 24, 25.

In a suit for the negligence of a street railway company the statement of the plaintiff that she did not blame the motorman is inadmissible. *Budd v. Meriden El. R. R. Co.*, 69 Conn. 285.

A letter written by the plaintiffs to the defendant, asserting the validity of their own claim and the unsoundness of the defendant's counterclaim, is inadmissible as evidence of the due performance by the plaintiffs of their contract. Such a letter stands upon the same ground as a party's declarations in his own favor. *Smith v. Phipps*, 65 Conn. 302.

MASSACHUSETTS.

Admissions competent evidence.—*Whitney v. Bayley*, 4 Allen, 173; *Lord v. Bigelow*, 124 Mass. 185.

Instances.—The question is, whether a certain mortgage and note were given without consideration.

The statements of A, the mortgagee, after the execution of the mortgage, and in the presence of B, the mortgagor, tending to show

that no consideration had passed between the parties, are deemed to be relevant to the question in controversy as admissions. *Saunders v. Dunn*, 175 Mass. 164, 55 N. E. 175.

An agreement to buy shares in a corporation is an admission of its existence. *Mann v. Williams*, 143 Mass. 394.

Agency may be disproved by admissions. *Hosmer v. Groat*, 143 Mass. 16.

Compromises.—Offers of compromise are not admissible. *Greve v. Wood-Harmon Co.*, 173 Mass. 45.

But admissions of fact in the course of conversations, with reference to compromise, are admissible. *Durgin v. Somers*, 117 Mass. 55; *Akers v. Demond*, 103 Mass. 318.

ARTICLE 16.*

WHO MAY MAKE ADMISSIONS ON BEHALF OF OTHERS,
AND WHEN.

Admissions may be made on behalf of the real party to any proceeding—

By any nominal party to that proceeding;

By any person who, though not a party to the proceeding, has a substantial interest in the event;

By any one who is privy in law, in blood, or in estate to any party to the proceeding, on behalf of that party.

A statement made by a party to a proceeding may be an admission whenever it is made, unless it is made by a person suing or sued in a representative character only, in which case [it seems] it must be made whilst the person making it sustains that character.

A statement made by a person interested in a proceeding, or by a privy to any party thereto, is not an admission unless

* See Note X.

it is made during the continuance of the interest which entitles him to make it.

Illustrations.

(a) The assignee of a bond sues the obligor in the name of the obligee.

An admission on the part of the obligee that the money due has been paid is deemed to be relevant on behalf of the defendant.⁴

(b) An admission by the assignee of the bond in the last illustration would also be deemed to be relevant on behalf of the defendant.

(c) A statement made by a person before he becomes the assignee of a bankrupt is not deemed to be relevant as an admission by him in a proceeding by him as such assignee.⁵

(d) Statements made by a person as to a bill of which he had been the holder are deemed not to be relevant as against the holder, if they are made after he has negotiated the bill.⁶

AMERICAN NOTE.

GENERAL.

Authorities.—1 Am. & Eng. Encyclopædia of Law (2d ed.), p. 670 *et seq.*; 1 Greenleaf on Evidence (15th ed.), sec. 169 *et seq.*

Nominal party.—*Turney v. Evans*, 14 N. H. 343.

But compare the following cases: *Butler v. Millet*, 47 Me. 492; *Gilligan v. Tebbets*, 33 Me. 360; *Sargeant v. Sargeant*, 18 Vt. 371; *Halloran v. Whitcomb*, 43 Vt. 306.

The declarations of the assignor of a chose in action, made after assignment, are not admissible against the assignee. *Butler v. Millet*, 47 Me. 492; *Sargeant v. Sargeant*, 18 Vt. 371.

Person with substantial interest.—*Bigelow v. Foss*, 59 Me. 162; *Fickett v. Smith*, 41 Me. 65, 66 Am. Dec. 214; *Earle v. Bearce*, 33 Me. 337; *Gooch v. Bryant*, 13 Me. (1 Shp.) 386; *Pike v. Wiggin*, 8 N. H. 356; *Hamblett v. Hamblett*, 6 N. H. 333; *Rich v. Eldredge*, 42 N. H. 153; *Carlton v. Patterson*, 29 N. H. (9 Fost.) 580; *Mathew-*

⁴ *Hanson v. Parker*, 1749, 1 Wils. 257.

⁵ *Fenwick v. Thornton*, 1827, M. & M. 51 (by Lord Tenterden). In *Smith v. Morgan*, 1839, 2 M. & R. 257, Tindal, C. J., decided exactly the reverse.

⁶ *Pocock v. Billing*, 1824, 2 Bing. 269.

son v. Eureka Powder Works, 44 N. H. 289; *Taylor v. Grand Trunk R. R. Co.*, 48 N. H. 304; *Carber's Admr. v. Bennett*, 60 Vt. 662.

Privies in law.—*Holt v. Walker*, 26 Me. (13 Shep.) 107, 45 Am. Dec. 98; *Parker v. Marston*, 34 Me. 386; *Wolcott v. Keith*, 22 N. H. (2 Fost.) 196; *Putnam v. Osgood*, 52 N. H. 148; *Alger v. Andrews*, 47 Vt. 238; *Miller v. Bingham*, 29 Vt. (3 Williams) 82.

Instances.—Declarations of one in the possession of personal property that it is owned by another are deemed to be relevant in favor of the person declared to be the owner, as against an officer who has attached it as the property of the declarant. *Putnam v. Osgood*, 52 N. H. 148.

Privies in blood.—Supporting text: *Dale v. Gower*, 24 Me. (11 Shep.) 563; *Tilton v. Emery*, 17 N. H. 536; *Pike v. Hayes*, 14 N. H. 19, 40 Am. Dec. 171; *Little v. Gibson*, 39 N. H. 505; *Baker v. Haskell*, 47 N. H. 479, 93 Am. Dec. 455; *Hunt v. Haven*, 56 N. H. 87; *Hurlburt v. Wheeler*, 40 N. H. 73; *Wheeler v. Wheeler's Estate*, 47 Vt. 637; *Gilbert v. Vail*, 60 Vt. 261, 14 Atl. 542.

Instance.—The declarations of an intestate that he had given his son something handsome, and, if he did well for him, should give him more, that he had held a writing against him, not a note, but had made him a present of it; and that he had had claims against him, but had none then,—being made by the ancestor against his right and interest, are deemed to be relevant against, and binding on, those claiming under him and in his right. *Wheeler v. Wheeler's Estate*, 47 Vt. 637.

Privies in estate.—*Royal v. Chandler*, 79 Me. 265, 1 Am. St. Rep. 305, 9 Atl. 675; *Holt v. Walker*, 26 Me. (13 Shep.) 107; *Treat v. Strickland*, 23 Me. (10 Shep.) 234; *Littlefield v. Getchell*, 32 Me. 390; *Crane v. Marshall*, 16 Me. (4 Shep.) 27, 33 Am. Dec. 631; *Peabody v. Hewett*, 52 Me. 33; *Adams v. French*, 2 N. H. 387; *Morrill v. Foster*, 33 N. H. 379; *Inhabitants of South Hampton v. Fowler*, 54 N. H. 197; *Smith v. Powers*, 15 N. H. 546; *Pike v. Hayes*, 14 N. H. 19, 40 Am. Dec. 171; *Hobbs v. Crane*, 22 N. H. (2 Fost.) 130; *Dow v. Jewell*, 18 N. H. 340, 45 Am. Dec. 371; *Fellows v. Fellows*, 37 N. H. 75; *Rand v. Dodge*, 17 N. H. 343; *Smith v. Putnam*, 62 N. H. 369; *Wood v. Fiske*, 62 N. H. 173; *Bennett v. Camp*, 54 Vt. 36; *Beecher v. Parmelee*, 9 Vt. 352; *Downs v. Belden*, 46 Vt. 674; *Hale v. Rich*, 48 Vt. 217; *Coffin v. Cole*, 67 Vt. 226, 31 Atl. 313.

Instance.—The question is, whether A, now deceased, made his will subject to undue influence exercised upon him by B, the residuary legatee thereunder.

In a contest of the will, to which B is a party, the admissions of B are relevant to the question in controversy. *Fay v. Feely*, 18 R. I. 715, 38 Atl. 342.

When made — Parties.—Supporting text: *McCobb v. Healy*, 17 Me. (5 Shep.) 158; *Taylor v. Grand Trunk R. R. Co.*, 48 N. H. 304; *Tufts v. Hayes*, 5 N. H. 452; *Straw v. Jones*, 9 N. H. 400; *Perkins v. Towle*, 59 N. H. 583; *Barber's Admr. v. Bennett*, 60 Vt. 662, 15 Atl. 348, 6 Am. St. Rep. 141, 1 L. R. A. 224 (citing this article).

When made — Representatives.—*Brooks v. Goss*, 61 Me. 307; *Barber v. Bennett*, 60 Vt. 662, 15 Atl. 348, 6 Am. St. Rep. 41, 1 L. R. A. 224 (citing this article).

Continuance of interest.—Supporting last paragraph of text: *Merrick v. Parkman*, 18 Me. 407; *Bryant v. Crosby*, 40 Me. 9; *Holt v. Walker*, 26 Me. (13 Shep.) 107; *Treat v. Strickland*, 23 Me. (10 Shep.) 234; *Tarr v. Smith*, 68 Me. 97; *Osgood v. Eaton*, 63 N. H. 355; *Morrill v. Foster*, 33 N. H. 379.

Acceptance of benefit.—*Spaulding v. Albin*, 63 Vt. 148, 21 Atl. 530; *Carpenter v. Hollister*, 13 Vt. 552, 37 Am. Dec. 612; *Alger v. Andrews*, 47 Vt. 238.

CONNECTICUT.

Nominal party.—*Bulkley v. Landon*, 3 Conn. 84; *Coit v. Tracy*, 8 Conn. 277; *Scripture v. Newcomb*, 16 Conn. 591. Compare *Smith v. Vincent*, 15 Conn. 4, 11.

Person with substantial interest.—Modifying the rule of the text. *Hamlin v. Fitch*, Kirby, 174; *Stratford v. Sanford*, 9 Conn. 275, 284. Compare *Bucknam v. Barnum*, 15 Conn. 74.

The interest must be a substantial one. The admission of the holder of a bare legal title is not competent. *Townsend Sav. Bank v. Todd*, 47 Conn. 217.

Privies.—*Ramsbottom v. Phelps*, 18 Conn. 278, 282–285; *Norton v. Pettibone*, 7 Conn. 319, 18 Am. Dec. 116; *Rogers v. Moore*, 10 Conn. 13; *Higley v. Bidwell*, 9 Conn. 451; *Beers v. Hawley*, 2 Conn. 469, 470–472; *Betts v. Davenport*, 3 Conn. 286, 288; *Williams v. Ensign*, 4 Conn. 456; *Botsford v. Wallace*, 69 Conn. 263; *Ladies' Seamen's Friend Society v. Halstead*, 58 Conn. 149. Compare *Fitch v. Chapman*, 10 Conn. 8; *Potter v. Waite*, 55 Conn. 236, 10 Atl. 563; *Deming v. Carrington*, 12 Conn. 1, 30 Am. Dec. 591; *Linahan v. Barr*, 41 Conn. 471; *Smith v. Martin*, 17 Conn. 401; *Norton v. Pettibone*, 7 Conn. 323; *Rogers v. Moore*, 10 Conn. 18; *Peck, Stowe & Wilcox Co. v. Atwater Mfg. Co.*, 61 Conn. 33; *Kinney v. Farnsworth*, 17 Conn. 361, 362.

When made — Parties.— A party's admissions are relevant whenever they were made. *Plant v. McEwen*, 4 Conn. 549.

When made — Representatives.— An admission of one suing or sued in a representative capacity to be admissible must have been made while he sustained that character. *Plant v. McEwen*, 4 Conn. 549.

MASSACHUSETTS.

Nominal party.— Modifying the rule of the text. *Wing v. Bishop*, 3 Allen, 456.

Instance.— The declarations of the assignor of a chose in action, made after the assignment, are not admissible against the assignee. *Wing v. Bishop*, 85 Mass. (3 Allen) 456.

Persons with substantial interest.— *Bayley v. Bryant*, 41 Mass. (24 Pick.) 198; *Smith v. Aldrich*, 94 Mass. (12 Allen) 553; *Lawrence v. Boston*, 119 Mass. 126; *Ryan v. Merriam*, 4 Allen, 77; *Butler v. Damon*, 15 Mass. 223.

Privies in law.— *Heywood v. Heywood*, 10 Allen, 105; *Daggett v. Simonds*, 173 Mass. 340, 53 N. E. 907, 46 L. R. A. 332.

Instance.— On the issue whether the gift of a promissory note was made, statements of the alleged donor, who died before the trial of an action on the note, at different times before and after the alleged gift, and inconsistent therewith, are deemed to be relevant and admissible to contradict the testimony of the donee, although not made in the latter's presence. *Whitwell v. Winslow*, 132 Mass. 307.

Privies in blood.— *Crosman v. Fuller*, 34 Mass. (17 Pick.) 171; *Plimpton v. Chamberlain*, 70 Mass. (4 Gray) 320; *Wilson v. Terry*, 91 Mass. (9 Allen) 214; *Fellows v. Smith*, 130 Mass. 378; *White v. Loring*, 41 Mass. (24 Pick.) 319; *Hodges v. Hodges*, 56 Mass. (2 Cush.) 455; *Heywood v. Heywood*, 92 Mass. (10 Allen) 105.

Privies in estate.— *Simpson v. Dix*, 131 Mass. 179; *Pickering v. Reynolds*, 119 Mass. 111; *Hyde v. Middlesex County*, 68 Mass. (2 Gray) 267; *Osgood v. Coates*, 1 Allen (83 Mass.) 77; *Blake v. Everett*, 83 Mass. (1 Allen) 248; *Tyler v. Mather*, 75 Mass. (9 Gray) 177; *Foster v. Hall*, 29 Mass. (12 Pick.) 89, 22 Am. Dec. 400; *Inhabitants of West Cambridge v. Inhabitants of Lexington*, 19 Mass. (2 Pick.) 536; *Bosworth v. Sturtevant*, 56 Mass. (2 Cush.) 392.

Instance.— Declarations of a former owner of land, made during his ownership, and tending to prove the existence of a right of way over it, are competent evidence against the present owner. *Blake v. Everett*, 83 Mass. (1 Allen) 248.

When made parties.— *Batchelder v. Rand*, 117 Mass. 176; *Henshaw v. Mullens*, 121 Mass. 143; *Dole v. Young*, 41 Mass. (24 Pick.) 250; *Davis v. Spooner*, 3 Pick. (20 Mass.) 284.

When made — Representatives.— *Hill v. Buckminster*, 5 Pick. 391; *Faunce v. Gray*, 21 Pick. 243; *Phillips v. Middlesex*, 127 Mass. 262.

Instance.— In a petition for damages to real estate of A, now deceased, caused by the discontinuance of a public street in a city, the fact that B, the administrator of the estate of A, who is a witness, as the petitioner, does not make acts done by him on his own account, during the life of A, competent evidence against A's estate. *Webster v. City of Lowell*, 142 Mass. 324, 8 N. E. 54.

Continuance of interest.— *Kimball v. Leland*, 110 Mass. 323; *Chase v. Horton*, 143 Mass. 118, 19 N. E. 31; *Roberts v. Medbery*, 132 Mass. 100; *Bond v. Fitzpatrick*, 4 Gray, 89; *Stockwell v. Blamey*, 129 Mass. 312; *Hyde v. Middlesex County*, 2 Gray, 267; *Osgood v. Coates*, 1 Allen, 77; *Blake v. Everett*, 1 Allen, 248; *Simpson v. Dix*, 131 Mass. 179.

ARTICLE 17.*

ADMISSIONS BY AGENTS AND PERSONS JOINTLY INTERESTED WITH PARTIES.

Admissions may be made by agents authorised to make them either expressly or by the conduct of their principals: but a statement made by an agent is not an admission merely because if made by the principal himself it would have been one.

A report made by an agent to a principal is not an admission which can be proved by a third person.⁷

Partners and joint contractors are each other's agents for the purpose of making admissions against each other in relation to partnership transactions or joint contracts.

* See Note XI.

⁷ *Re Devala Company*, 1883, 22 Ch. Div. 593.

Barristers and solicitors are the agents of their clients for the purpose of making admissions whilst engaged in the actual management of the cause, either in court or in correspondence relating thereto; but statements made by a barrister or solicitor on other occasions are not admissions merely because they would be admissions if made by the client himself.

The fact that two persons have a common interest in the same subject-matter does not entitle them to make admissions respecting it as against each other.

In cases in which actions founded on a simple contract have been barred by the Statute of Limitations no joint contractor or his personal representative loses the benefit of such statute, by reason only of any written acknowledgment or promise made or signed by [or by the agent duly authorised to make such acknowledgment or promise of] any other or others of them [or by reason only of payment of any principal, interest or other money, by any other or others of them].⁸

A principal, as such, is not the agent of his surety for the purpose of making admissions as to the matters for which the surety gives security.

Illustrations.

(a) The question is, whether a parcel, for the loss of which a Railway Company is sued, was stolen by one of their servants. Statements made by the station-master to a police officer, suggesting that

⁸ 9 Geo. IV, c. 14, s. 1. The words in the first set of brackets were added by 19 & 20 Vict. c. 97, s. 13. The words in the second set by s. 14 of the same Act. The language is slightly altered.

the parcel had been stolen by a porter, are deemed to be relevant, as against the railway, as admissions by an agent.⁹

(b) A allows his wife to carry on the business of his shop in his absence. A statement by her that he owes money for goods supplied to the shop is deemed to be relevant against him as an admission by an agent.¹⁰

(c) A sends his servant, B, to sell a horse. What B says at the time of the sale, and as part of the contract of sale, is deemed to be a relevant fact as against A, but what B says upon the subject, at some different time is not deemed to be relevant as against A¹¹ [though it might have been deemed to be relevant if said by A himself].

(d) The question is, whether a ship remained at a port for an unreasonable time. Letters from the plaintiff's agent to the plaintiff containing statements which would have been admissions if made by the plaintiff himself are deemed to be irrelevant as against him.¹²

(e) A, B, and C sue D as partners upon an alleged contract respecting the shipment of bark. An admission by A that the bark was his exclusive property and not the property of the firm is deemed to be relevant as against B and C.¹³

(f) A, B, C, and D make a joint and several promissory note. Either can make admissions about it as against the rest.¹⁴

(g) The question is, whether A accepted a bill of exchange. A notice to produce the bill signed by A's solicitor and describing the bill as having been accepted by A is deemed to be a relevant fact.¹⁵

(h) The question is, whether a debt to A, the plaintiff, was due from B, the defendant, or from C. A statement made by A's solicitor to B's solicitor in common conversation that the debt was due from C is deemed not to be relevant against A.¹⁶

(i) One co-part-owner of a ship cannot, as such, make admissions against another as to the part of the ship in which they have a common

⁹ *Kirkstall Brewery v. Furness Ry.*, 1874, L. R. 9 Q. B. 468.

¹⁰ *Clifford v. Burton*, 1823, 1 Bing. 199.

¹¹ *Helyear v. Hawke*, 1803, 5 Esp. 72.

¹² *Langhorn v. Allnutt*, 1812, 4 Tau. 511.

¹³ *Lucas v. De La Cour*, 1813, 1 M. & S. 249.

¹⁴ *Whitcomb v. Whitting*, 1781, 1 S. L. C. 644.

¹⁵ *Holt v. Squire*, 1825, Ry. & Mo. 282.

¹⁶ *Petch v. Lyon*, 1846, 9 Q. B. 147.

interest, even if he is co-partner with that other as to other parts of the ship.¹⁷

(j) A is surety for B, a clerk. B being dismissed makes statements as to sums of money which he has received and not accounted for. These statements are not deemed to be relevant as against A, as admissions.¹⁸

AMERICAN NOTE.

GENERAL.

Authorities.—1 Am. & Eng. Encyclopædia of Law (2d ed.), p. 690 *et seq.*; McKelvey on Evidence, p. 100 *et seq.*

Agents.—The admissions of a public official are competent evidence to bind the public corporation, when made in connection with some act within the scope of his duties. *Smythe v. Bangor*, 72 Me. 252; *Gray v. Rollinsford*, 58 N. H. 253.

The admission of a mere inhabitant is incompetent. *Petition of Landoff*, 34 N. H. 163.

Either a wife or husband may be an agent of the other party to the relation, but the agency must be shown; it is not presumed. *Goodrich v. Tracy*, 43 Vt. 314.

Partners.—*Fickett v. Swift*, 41 Me. 65, 66 Am. Dec. 214.

Sustaining the text so far as admissions made during the existence of the partnership are concerned. *Griffin v. Stearns*, 44 N. H. 498.

The fact of partnership must first be shown. *Bundy v. Bruce*, 61 Vt. 619.

While there is a conflict on the point, some authorities have held that the admissions of a partner as to acts during the existence of the partnership, are admissible, to charge the partnership, if made after dissolution. *Parker v. Merrill*, 6 Greenl. (Me.) 41; *Hinkley v. Gilligan*, 34 Me. 101; *Loomis v. Loomis*, 26 Vt. 198, 203; *Rich v. Flanders*, 39 N. H. 304, 339.

Attorneys.—*Holley v. Young*, 68 Me. 215.

Statute of limitations.—The paragraph next to the last of the text (with reference to the statute of limitations) is based, as seen in the notes, upon English statutes. At common law an oral acknowledg-

¹⁷ *Jagers v. Binnings*, 1815, 1 Star. 64.

¹⁸ *Smith v. Whippingham*, 1833, 6 C. & P. 78. See also *Evans v. Beattie*, 1803, 5 Esp. 26; *Bacon v. Chesney*, 1816, 1 Star. 192; *Caermarthen R. C. v. Manchester R. C.*, 1873, L. R. 8 C. P. 685.

ment has the same effect as a written one. In the absence of statute the admissions of one joint contractor start the running of the statute of limitations against the others anew. *Shepley v. Waterhouse*, 22 Me. 497; *Woonsocket Inst. v. Ballou*, 16 R. I. 351.

A statute somewhat similar to the English statutes upon which the text is based exists in Vermont. Statutes, sec. 1217; *Bailey v. Corliss*, 51 Vt. 366.

Illustration (i).—Similar to illustration (i). *McLellan v. Cox*, 36 Me. 95.

CONNECTICUT.

Agents.—*Carney v. Hennessey*, 73 Conn.

The declarations of an agent, in the course of his agency, are evidence against the principal. *Perkins v. Burnet*, 2 Root, 30; *Mather v. Phelps*, 2 Root, 150; *N. & W. R. R. Co. v. Cahill*, 18 Conn. 492. See also *Southington Eccl. Society v. Gridley*, 20 Conn. 204; *Plumb v. Curtis*, 66 Conn. 154.

But not his declarations as to acts previously done by him, as agent. *Fairfield County Turnpike Co. v. Thorp*, 13 Conn. 128.

Before the declarations of one claimed to be an agent of the party can be received, his agency must be proved *aliunde*. *Fitch v. Chapman*, 10 Conn. 12; *Builders' Supply Co. v. Cox*, 68 Conn. 381.

While it is within the discretion of the court to admit the declarations of an agent before the agency is established, yet that fact must be proved in order to make the declarations competent evidence. *Builders' Supply Co. v. Cox*, 68 Conn. 380.

A letter of the plaintiff directing a certain person to make demand upon the defendant for property about to be replevied, is admissible upon the part of the plaintiff to show the agent's authority. *State Bank v. Waterhouse*, 70 Conn. 76.

Evidence of promises by a recruiting agent of the State, to induce re-enlistments, is not admissible against a town, unless his authority to act for it is shown. *Bogue v. Montville*, 69 Conn. 472.

The admissions of the president and directors of a bank that an indorsement on a note, discounted by the bank, was known by them to be a forgery, are inadmissible in defense to a suit by the bank on the indorsement. *Hartford Bank v. Hart*, 3 Day, 495.

A third party told a creditor, in the presence of the debtor, that, after they settled their accounts (which was to be done in a day or two) W (the debtor) would pay him (the creditor) if he owed him anything, to which W, being appealed to by the speaker, replied that

he supposed that was right. Held, that this might be a sufficient acknowledgment to remove the bar of the statute as to a portion of the account. *Lee v. Wyse*, 35 Conn. 389.

Statements made by the agents of the payee of a note tending to prove fraud by means of which it was obtained, are admissible. *Arnold v. Lane*, 71 Conn. 62.

Prior to an action to recover for glass bulbs, where the defendant, by way of counterclaim, alleged that many contained a latent defect, in consequence of which the business and reputation of the defendant had suffered, the defendant had employed an expert glassblower to ascertain the cause of the difficulty, and appointed one P as its agent, with directions to assist said expert. During such investigations said P, in response to questions of said expert, stated that the defendant had experienced the same difficulty before with said bulbs, and did not then know the cause of it, but had simply worked into and out of the trouble. Held, that such statements were within the scope of the agency, and that the expert, as a witness for the plaintiff, might testify to them as admissions of the defendant. *Thill's Sons & Co. v. Perkins Electric Lamp Co.*, 63 Conn. 484.

Held, also, that said expert might state that on testing lamps made under his directions and of said bulbs, the said P declared they were good lamps and burned well. *Thill's Sons & Co. v. Perkins Electric Lamp Co.*, 63 Conn. 484.

Where the plaintiff sued for property attached by the defendant as the property of a third party of whom the plaintiff claimed to have purchased it, it was held, that C, who had the charge of certain property of the plaintiff as to which no question was made, did not become thereby so far the agent of the plaintiff that his declarations as to the property in dispute could be used against the plaintiff. *Charter v. Lane*, 62 Conn. 123, 124.

Partners.—In an action against former copartners, upon a plea of the statute of limitations, evidence of an acknowledgment by one, after the dissolution, and when himself insolvent, is admissible against both. *Austin v. Bostwick*, 9 Conn. 501. See also *Bissell v. Adams*, 35 Conn. 299.

Members and officers of corporations.—If a corporation be a party to a suit, the declarations of one of its stockholders and directors are not admissible against it on the ground of their being the declarations of a party. *Fairfield County Turnpike Co. v. Thorp*, 15 Conn. 179.

Evidence is not admissible to impeach the title of a school district, claiming lands by adverse possession, that some of its members have,

at times, spoken of the lands as belonging to the disseisee. *South School District v. Blakeslee*, 13 Conn. 235.

A subcontractor for the building of a railroad sued the railroad company for extra work in regrading where an embankment had settled; and, among other evidence, offered his employer, the principal contractor, as a witness, who testified that D, a director of the company, and one of the building committee, inquired of him what was to be done in consequence of this settling, saying that the company did not expect him to pay the expense of regrading, but only wanted to know his opinion as to the best mode of doing it. Held, that this testimony was admissible, as showing the declarations of an agent made when acting in the business of his agency and within the scope of his authority. *Norwich & Worcester R. R. Co. v. Cahill*, 18 Conn. 491, 492.

A director of corporation can make admissions provable in a suit against the corporation. *Tryon v. White & Corbin Co.*, 62 Conn. 172.

Joint contractors.—*Bound v. Lathrop*, 4 Conn. 339; *Pierce v. Roberts*, 57 Conn. 40.

The acknowledgment of one of several joint makers of a promissory note takes it out of the statute as against the others. *Bound v. Lathrop*, 4 Conn. 338, 339.

And this, although the others were only sureties for the first; if the promise was not collusively made. *Clark v. Sigourney*, 17 Conn. 516; *Caldwell v. Sigourney*, 19 Conn. 44.

Attorneys.—*Perry v. Simpson Water-Proof Mfg. Co.*, 40 Conn. 316, 317; *Rockwell v. Taylor*, 41 Conn. 57.

Surety.—In an action upon a joint and several bond, against principal and surety, admissions of the principal, as to the extent of the liability of the obligors, which are receivable against him, are also evidence against the surety. *Davis v. Kingsley*, 13 Conn. 298.

In an action against one who, as surety, executed, with the principal, a joint and several note, proof of his execution of it amounts to proof of an admission, on his part, that the principal signed it. *Bond v. Storrs*, 13 Conn. 417.

In an action against principal and surety in a bond conditioned for the conveyance of lands, which should be appraised at a certain amount over all incumbrances, the plaintiff may prove the admission of the principal, made at the time of the appraisal, as to the extent of the incumbrances. *Davis v. Kingsley*, 13 Conn. 294.

In a suit against principal and surety on a bond to account for moneys received by the former, as an insurance agent, his books, kept

as such, were offered to prove a defalcation. They contained some charges of premiums for which credit was given by consent of the insurance company, and no cash actually received. Held, that the books were admissible against the surety; although he could be affected only by the entries of the actual cash receipts. *Agricultural Ins. Co. v. Keeler*, 44 Conn. 163-167.

Illustration (a).—*Rockwell v. Taylor*, 41 Conn. 59.

MASSACHUSETTS.

Agents.—*Stiles v. Western R. R. Co.*, 8 Metc. 44, 41 Am. Dec. 486.

Either a wife or husband may be an agent of the other party to the relation, but the agency must be shown; it is not presumed. *McGregor v. Wait*, 10 Gray, 72.

The admissions of a public official are competent evidence to bind the public corporation only when made in connection with some act within the scope of his duties. *Weeks v. Needham*, 156 Mass. 289.

The agency must be proved before the admissions can become competent evidence. *Baker v. Gerrish*, 14 Allen, 201; *Shaffer v. Sawyer*, 123 Mass. 294; *Lord v. Bigelow*, 124 Mass. 185.

Unless the authority to make admissions be express, the admissions of an agent, to be competent evidence, must be connected with some act within the scope of his authority. They must be part of the *res gestæ*. *Lane v. B. & A. R. R. Co.*, 112 Mass. 455.

Partners.—Sustaining the text so far as admissions made during the existence of the partnership are concerned. *Smith v. Collins*, 115 Mass. 388; *Odiorne v. Maxcy*, 15 Mass. 39; *Ostrom v. Jacobs*, 9 Metc. 454; *Dutton v. Woodman*, 9 Cush. 255; *Allcott v. Strong*, 9 Cush. 323; *Robins v. Warde*, 111 Mass. 244.

The fact of partnership must first be shown. *Allcott v. Strong*, 9 Cush. 323; *Robins v. Warde*, 111 Mass. 244; *Tuttle v. Cooper*, 5 Pick. 414; *Robbins v. Willard*, 6 Pick. 464; *Dutton v. Woodman*, 9 Cush. 255; *Currier v. Silloway*, 1 Allen, 19; *Smith v. Collins*, 115 Mass. 388.

The partnership must be established by evidence *aliunde*, not by entries in the partnership books. *Abbott v. Pearson*, 130 Mass. 191.

Part payment by one partner stops the running of the statute of limitations as to the other partners, if made after dissolution but before the creditor has received notice of the dissolution. *Burton v. Edwards*, 134 Mass. 567.

While there is conflict upon this point, many authorities hold that an admission made after the dissolution of the partnership, as to a

transaction occurring during its existence, may be shown. *Gay v. Bowen*, 8 Metc. 100; *Buxton v. Edwards*, 134 Mass. 567, 579.

Joint contractors.—*Dennie v. Williams*, 135 Mass. 28; *Martin v. Root*, 17 Mass. 222; *Hunt v. Bridgham*, 2 Pick. 581; *Amherst Bank v. Root*, 2 Metc. 522.

Attorneys.—*Saunders v. McCarthy*, 8 Allen, 42.

The admissions of an attorney may be either oral or written. *Loomis v. N. Y., etc., R. R. Co.*, 159 Mass. 39.

Sureties.—Supporting text: *Chelmsford Co. v. Demarest*, 7 Gray, 1. Compare *Bank of Brighton v. Smith*, 12 Allen, 243.

Statute of limitations.—A statute somewhat similar to the English act upon which this paragraph of the text is based, exists in Massachusetts. Pub. Stat., c. 197, sec. 17; *Faulkner v. Bailey*, 123 Mass. 588.

Illustration (a).—*Green v. B. & L. R. R. Co.*, 128 Mass. 221; *B. & M. R. R. Co. v. Ordway*, 140 Mass. 510.

Illustration (e).—See *Harding v. Butler*, 156 Mass. 34.

Illustration (h).—*Saunders v. McCarthy*, 8 Allen, 553.

Illustration (i).—*Smith v. Aldrich*, 12 Allen, 553.

ARTICLE 18.*

ADMISSION BY STRANGERS.

Statements by strangers to a proceeding are not relevant as against the parties except in the cases hereinafter mentioned.¹⁹

In actions against sheriffs for not executing process against debtors, statements of the debtor admitting his debt to be due to the execution creditor are deemed to be relevant as against the sheriff.²⁰

* See Note XII.

¹⁹ *Coole v. Braham*, 1848, 3 Ex. 183. For a third exception, which could hardly occur now, see *Clay v. Langslow*, 1827, M. & M. 45.

²⁰ *Kempland v. Macauley*, 1791, Peake, 95; *Williams v. Bridges*, 1817, 2 Star. 42.

In actions by the trustees of bankrupts an admission by the bankrupt of the petitioning creditor's debt is deemed to be relevant as against the plaintiff.²¹

AMERICAN NOTE.

GENERAL.

Authorities.—1 Am. & Eng. Encyclopædia of Law (2d ed.), p. 675 *et seq.*; 2 Taylor on Evidence (Chamberlayne's 9th ed.), sec. 759.

Statements by strangers.—Sustaining the text as to their inadmissibility generally. *Taylor v. Grand Trunk R. R. Co.*, 48 N. H. 304, 2 Am. Rep. 229.

Private boundaries.—See cases under Article 30.

CONNECTICUT.

Statements by strangers.—Sustaining the text as to their inadmissibility generally. *Davis v. Kingsley*, 13 Conn. 285.

The declarations of ancient persons as to private boundaries are admissible. Swift's System, p. 244; 1 Swift's Digest, side p. 766; Swift's Evidence, p. 123; *Wooster v. Butler*, 13 Conn. 316; *Kenney v. Farnsworth*, 17 Conn. 363; *Higley v. Bidwell*, 9 Conn. 451; *Merwin v. Morris*, 71 Conn. 572. *Contra* (in case of interested persons), *Porter v. Warner*, 2 Root, 22.

Actions against officers.—(Second paragraph of text.) *Hart v. Stevenson*, 25 Conn. 499, 506.

Bankruptcy.—*Ramsbottom v. Phelps*, 18 Conn. 278.

MASSACHUSETTS.

Statements by strangers.—Sustaining text as to inadmissibility generally of the statements of strangers. *Lyon v. Manning*, 133 Mass. 439; *Wilson v. Bowden*, 113 Mass. 422; *Kafer v. Harlow*, 5 Allen, 348; *Kline v. Baker*, 106 Mass. 61.

Private boundaries.—See cases under Article 30.

As to the second paragraph of text, see *Strong v. Wheeler*, 5 Pick. 410.

Bankruptcy.—*Carnes v. White*, 15 Gray, 378; *Wellington v. Jackson*, 121 Mass. 157.

²¹ *Jarrett v. Leonard*, 1814, 2 M. & S. 265 (adapted to the new law of bankruptcy).

ARTICLE 19.*

ADMISSION BY PERSON REFERRED TO BY PARTY.

When a party to any proceeding expressly refers to any other person for information in reference to a matter in dispute, the statements of that other person may be admissions as against the person who refers to him.

Illustration.

The question is, whether A delivered goods to B. B says "if C" (the carman) "will say that he delivered the goods, I will pay for them." C's answer may as against B be an admission.²²

AMERICAN NOTE.

GENERAL.

Authorities.—10 Am. & Eng. Encyclopædia of Law (2d ed.), p. 701; 1 Greenleaf on Evidence (15th ed.), sec. 182.

Supporting text.—*Chapman v. Twitchell*, 37 Me. 59, 58 Am. Dec. 773; *Folsom v. Batchelder*, 22 N. H. 47.

CONNECTICUT.

Supporting text.—*Chadsey v. Greene*, 24 Conn. 562.

MASSACHUSETTS.

Supporting text.—*Gott v. Dinsmore*, 111 Mass. 45; *Proctor v. Old Colony R. R. Co.*, 154 Mass. 251; *Com. v. Vose*, 157 Mass. 393.

ARTICLE 20.†

ADMISSIONS MADE WITHOUT PREJUDICE.

No admission is deemed to be relevant in any civil action if it is made either upon an express condition that evidence

* See Note XIII.

† See Note XIV.

²² *Daniel v. Pitt*, 1808, 1 Camp. 366, n. See, too, *R. v. Mallory*, 1884, 13 Q. B. D. 33. This is a weaker illustration than *Daniel v. Pitt*.

of it is not to be given,²³ or under circumstances from which the judge infers that the parties agreed together that evidence of it should not be given,²⁴ or if it was made under duress.²⁵

AMERICAN NOTE.

GENERAL.

Authorities.—1 Am. & Eng. Encyclopædia of Law (2d ed.), pp. 715-717; 2 Taylor on Evidence (Chamberlayne's 9th ed.), p. 554⁸.

Supporting text so far as offers of compromise are concerned. *Perkins v. Concord R. R. Co.*, 44 N. H. 223.

MASSACHUSETTS.

Duress.—Sustaining text. *Tilley v. Damon*, 11 Cush. 247.

The admission need not be voluntary in the sense in which a confession must be voluntary. *Newhall v. Jenkins*, 2 Gray, 562.

ARTICLE 21.

CONFESSIONS DEFINED.

A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference, that he committed that crime. Confessions, if voluntary, are deemed to be relevant facts as against the persons who make them only.

AMERICAN NOTE.

GENERAL.

Authorities.—6 Am. & Eng. Encyclopædia of Law (2d ed.), p. 520 *et seq.*; Underhill on Torts, sec. 88 *et seq.*

²³ *Cory v. Bretton*, 1830, 4 C. & P. 462.

²⁴ *Paddock v. Forester*, 1842, 3 M. & G. 903.

²⁵ *Stockfleth v. De Tastet*, 1814, *per* Ellenborough, C. J., 4 Camp. 10.

Confession defined in *State v. Carr*, 53 Vt. 37.

Confession to be admitted, must be voluntary. *State v. Walker*, 34 Vt. 296. (*Contra State v. Jenkins*, 2 Tyler (Vt.), 377.) *State v. York*, 37 N. H. 175.

CONNECTICUT.

Remote and obscure allusions by the accused to the act in contemplation are admissible on a criminal prosecution, as tending to show an existing disposition or design. *State v. Hoyt*, 47 Conn. 538, 539.

Statements of the accused in the nature of a confession are admissible in evidence, upon the ground that a party's conduct in respect to the matter in dispute, whether exhibited by acts, speech, or writing, which is clearly inconsistent with his contention, is a fact relevant to the issue. Such statements, however, are not in themselves testimony, but are matters to be proved as independent facts, the probative force of which must depend upon the circumstances of each particular case. *State v. Willis*, 71 Conn. 204.

MASSACHUSETTS.

A confession, to be admitted, must be voluntary. *Com. v. Nott*, 135 Mass. 269; *Com. v. Myers*, 160 Mass. 530; *Com. v. Morey*, 1 Gray, 461; *Com. v. Flood*, 152 Mass. 529, 25 N. E. 971.

A confession is admissible only against the person who made it. *Com. v. Ingraham*, 7 Gray, 46.

ARTICLE 22.*

CONFESSION CAUSED BY INDUCEMENT, THREAT, OR PROMISE, WHEN IRRELEVANT IN CRIMINAL PROCEEDING.

No confession is deemed to be voluntary if it appears to the judge to have been caused by any inducement, threat, or promise, proceeding from a person in authority, and having reference to the charge against the accused person,

* See Note XV.

whether addressed to him directly or brought to his knowledge indirectly;

and if (in the opinion of the judge)²⁶ such inducement, threat, or promise, gave the accused person reasonable grounds for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him.

A confession is not involuntary, only because it appears to have been caused by the exhortations of a person in authority to make it as a matter of religious duty, or by an inducement collateral to the proceeding, or by inducements held out by a person not in authority.

The prosecutor, officers of justice having the prisoner in custody, magistrates, and other persons in similar positions,

²⁶ It is not easy to reconcile the cases on this subject. In *R. v. Baldry*, 1852, 2 Den. 430, the constable told the prisoner that he need not say anything to criminate himself, but that what he did say would be taken down and used as evidence against him. It was held that this was not an inducement, though there were earlier cases which treated it as such. In *R. v. Jarvis*, 1867, 1 C. C. R. 96, the following was held not to be an inducement: "I think it is right I should tell you that besides being in the presence of my brother and myself" (prisoner's master), "you are in the presence of two officers of the public, and I should advise you that to any question that may be put to you, you will answer truthfully, so that if you have committed a fault you may not add to it by stating what is untrue. Take care. We know more than you think we know.— So you had better be good boys and tell the truth." On the other hand, in *R. v. Reeve*, 1872, 1 C. C. R. 364, the words, "You had better, as good boys, tell the truth:" in *R. v. Fennell*, 1881, 7 Q. B. D. 147, "The inspector tells me you are making housebreaking implements; if that is so, you had better tell the truth, it may be better for you," were held to exclude the confession which followed. There are later cases (unreported) which follow these.

are persons in authority. The master of the prisoner is not as such a person in authority if the crime of which the person making the confession is accused was not committed against him.

A confession is deemed to be voluntary if (in the opinion of the judge) it is shown to have been made after the complete removal of the impression produced by any inducement, threat, or promise which would otherwise render it involuntary.

Before a confession can be treated as relevant in a criminal trial it must be proved affirmatively that it was free and voluntary.²⁷

Facts discovered in consequence of confessions improperly obtained, and so much of such confessions as distinctly relate to such facts, may be proved.

Illustrations.

(a) The question is, whether A murdered B.

A handbill issued by the Secretary of State, promising a reward and pardon to any accomplice who would confess, is brought to the knowledge of A, who, under the influence of the hope of pardon, makes a confession. This confession is not voluntary.²⁸

(b) A being charged with the murder of B, the chaplain of the gaol reads the Communion Service to A, and exhorts him upon religious grounds to confess his sins. A, in consequence, makes a confession. This confession is voluntary.²⁹

²⁷ *R. v. Thompson*, [1893], 2 Q. B. 12. The early authorities on the admission of confessions are summed up in this case by Cave, J., who describes a "free and voluntary statement," as one which was not "preceded by any inducement to make a statement held out by a person in authority."

²⁸ *R. v. Boswell*, 1842, Car. & Marsh. 584.

²⁹ *R. v. Gilham*, 1828, 1 Moo. C. C. 186. In this case the exhortation was that the accused man should confess "to God," but it seems

(c) The gaoler promises to allow A, who is accused of a crime, to see his wife, if he will tell where the property is. A does so. This is a voluntary confession.³⁰

(d) A is accused of child murder. Her mistress holds out an inducement to her to confess, and she makes a confession. This is a voluntary confession, because her mistress is not a person in authority.³¹

(e) A is accused of the murder of B. C, a magistrate, tries to induce A to confess by promising to try to get him a pardon if he does so. The Secretary of State informs C that no pardon can be granted, and this is communicated to A. After that A makes a statement. This is a voluntary confession.³²

(f) A, accused of burglary, makes a confession to a policeman under an inducement which prevents it from being voluntary. Part of it is that A had thrown a lantern into a certain pond. The fact that he said so, and that the lantern was found in the pond in consequence, may be proved.³³

AMERICAN NOTE.

GENERAL.

Authorities.—6 Am. & Eng. Encyclopædia of Law (2d ed.), p. 525 *et seq.*; Underhill on Evidence, sec. 88 *et seq.*

Collateral inducement.—*State v. Wentworth*, 37 N. H. 218.

After removal of impression.—*State v. Carr*, 37 Vt. 191.

from parts of the case that he was urged also to confess to man "to repair any injury done to the laws of his country." According to the practice at that time, no reasons are given for the judgment. The principle seems to be that a man is not likely to tell a falsehood in such cases, from religious motives. The case is sometimes cited as an authority for the proposition that a clergyman may be compelled to reveal confessions made to him professionally. It has nothing to do with the subject.

³⁰ *R. v. Lloyd*, 1834, 6 C. & P. 393.

³¹ *R. v. Moore*, 1852, 2 Den. C. C. 522.

³² *R. v. Clewes*, 1830, 4 C. & P. 221.

³³ *R. v. Gould*, 1840, 9 C. & P. 364. This is not consistent, so far as the proof of the words goes, with *R. v. Warwickshall*, 1783, 1 Leach, 263.

CONNECTICUT.

A confession from hope or fear is not admissible; but a voluntary confession is deserving of the highest credit. *State v. Potter*, 18 Conn. 178.

The inquiry as to admissibility is addressed to the discretion of the court, and is whether, considering the age, situation, and character of the prisoner, and the circumstances, it was voluntary or not. *State v. Potter*, 18 Conn. 178.

Confessions are not excluded because confidentially made to private individuals, while endeavoring to persuade them to use their influence to secure the admission of the party confessing as a witness for the State. *State v. Thompson*, Kirb. 345.

The uncle of one under charge of murder told him that the circumstances were against him; that he thought he knew something about it; and that the sooner he confessed the better it would be for him. On the next day the prisoner declared to another person that he was concerned, with others whom he named, in the murder; but a week after the conversation with his uncle he sent for the jailer and the prosecuting officers, and told them that he alone committed the murder. *Held*, that the confession was admissible. *State v. Potter*, 18 Conn. 179, 180.

A confession is not admissible when it was the result of inducements held out by a public officer, or those connected with the prosecution, although they came from an officer not authorized to hold out inducements. *State v. Potter*, 18 Conn. 178; *State v. Thompson*, Kirb. 345.

Nor if a confession has been made under such circumstances, is a subsequent confession admissible, made under the influence of having made the former one, or in consequence of it, or in consequence of the inducements which occasioned the former one. *State v. Potter*, 18 Conn. 179, 180.

The discretion of the trial judge in receiving a confession involves a question of duty, and is, therefore, reviewable; and a clear case of abuse may furnish ground for a new trial. *State v. Willis*, 71 Conn. 294.

Where a person afterwards indicted for murder was summoned as a witness before a coroner and there told that he could not be compelled to make any statement, *held*, that his declarations then made are admissible against him on his trial upon the indictment. *State v. Coffee*, 56 Conn. 413-416.

The statement in question was not a confession by the prisoner, but simply a statement in relation to his own doings and whereabouts on the evening of the murder. *State v. Coffee*, 56 Conn. 414.

If there were any indication that the prisoner was not perfectly cool and self-possessed, so as to render his statements unreliable, that would seem to be a matter affecting the weight rather than the admissibility of the evidence. *State v. Coffee*, 56 Conn. 415.

A prosecuting officer cannot be admitted to testify against a prisoner, upon the trial, as to what the latter has disclosed to him upon an application to be admitted as a witness for the State. *State v. Phelps*, Kirb. 282.

After removal of impression.—*State v. Potter*, 18 Conn. 166.

The circumstances under which statements are made is a matter for the judge. The fact that prior to the confession to a sheriff, promises and inducements had been held out by another officer, does not, as matter of law, render the confession inadmissible. It may appear that the confession was uninfluenced, and voluntarily made. *State v. Willis*, 71 Conn. 294.

Facts discovered.—A statement by one accused of murder, as to what disposition he had made of the watch of the decedent, in connection with evidence identifying the watch, and that it was found at the place indicated, is admissible, no matter what promises had been previously made. *State v. Willis*, 71 Conn. 294.

MASSACHUSETTS.

Question for the judge.—The admissibility of a confession presents a question for the judge. *Com. v. Culver*, 126 Mass. 464.

If the evidence is conflicting he may admit it with instructions to disregard it if they find it was not voluntary. *Com. v. Preece*, 140 Mass. 276; *Com. v. Burrough*, 162 Mass. 512; *Com. v. Howe*, 9 Gray, 110; *Com. v. Smith*, 119 Mass. 305; *Com. v. Piper*, 120 Mass. 185; *Com. v. Cuffee*, 108 Mass. 285; *Com. v. Nott*, 135 Mass. 269.

Burden of proof.—In some States the burden of showing that a confession is not voluntary is on the defendant. It is *prima facie* admissible. *Com. v. Sego*, 125 Mass. 213.

When voluntary.—Sustaining the first paragraph of the text: *Com. v. Chabcock*, 1 Mass. 144; *Com. v. Knapp*, 9 Pick. 496, 20 Am. Dec. 491.

Confessions not voluntary are excluded, “not because any wrong is done to the prisoner in using them, but because he may be in-

duced by the pressure of hope or fear to admit facts unfavorable to him without regard to their truth in order to obtain the promised relief or avoid the threatened danger." *Com. v. Morey*, 1 Gray, 462.

A confession is admissible if it appears that the inducement had no effect. *Com. v. Crocker*, 108 Mass. 464. See also *Com. v. Knapp*, 9 Pick. 503.

A plea of guilty before a committing magistrate is admissible as a confession. *Com. v. Brown*, 150 Mass. 330.

A statement by an officer that "the more lies one tells in such cases, the deeper one gets into the mud" does not render a confession inadmissible. *Com. v. Mitchell*, 117 Mass. 431.

The mere threat of conviction does not render a confession inadmissible. *Com. v. Whittemore*, 11 Gray, 201.

The fact that the accused person at the time of the confession is in custody does not prevent the confession being voluntary. *Com. v. Cuffee*, 108 Mass. 285.

The mere fact that a confession is made through hope of favor does not affect its admissibility so long as the hope was not induced. *Com. v. Sego*, 125 Mass. 210, 213.

Where one agrees to turn State's evidence, under a promise of immunity from prosecution, but refuses subsequently to testify, his confession is admissible. *Com. v. Knapp*, 10 Pick. 477.

The inducement must be calculated to induce hope or fear. *Com. v. Sego*, 125 Mass. 210; *Com. v. Morey*, 1 Gray, 461.

Religious exhortation.—*Com. v. Tuckerman*, 10 Gray, 173; *Com. v. Drake*, 15 Mass. 161.

Mere advice.—Mere advice of a public official that it is better to confess, coupled with a statement that no promise is made, do not render the confession inadmissible. *Com. v. Nott*, 135 Mass. 269.

The character of the person holding out the inducement.—*Com. v. Howe*, 2 Allen, 153.

The master is a person in authority if he is the prosecutor. *Com. v. Sego*, 125 Mass. 210.

A confession to a public official, if voluntary, is admissible. *Com. v. Sheehan*, 163 Mass. 170; *Com. v. Holt*, 121 Mass. 61; *Com. v. Crocker*, 108 Mass. 464.

Person not in authority.—*Com. v. Tuckerman*, 10 Gray, 173, 190.

A confession to fellow members of the church is voluntary. *Com. v. Drake*, 15 Mass. 161.

After removal of impression.—Supporting the text: *Com. v. Howe*, 132 Mass. 250; *Com. v. Cullen*, 111 Mass. 435.

Facts discovered through confession.—*Com. v. Knapp*, 9 Pick. 497, 20 Am. Dec. 491.

ARTICLE 23.*

CONFESSIONS MADE UPON OATH, ETC.

Evidence amounting to a confession may be used as such against the person who gives it, although it was given upon oath, and although the proceeding in which it was given had reference to the same subject-matter as the proceeding in which it is to be proved, and although the witness might have refused to answer the questions put to him; but if, after refusing to answer any such question, the witness is improperly compelled to answer it, his answer is not a voluntary confession.³⁴

Illustrations.

(a) The answers given by a bankrupt in his examination may be used against him in a prosecution for offences against the law of bankruptcy.³⁵

(b) A is charged with maliciously wounding B.

Before the magistrates A appeared as a witness for C, who was charged with the same offence. A's deposition may be used against him on his own trial.³⁶

* See Note XVI.

³⁴ *R. v. Garbett*, 1847, 1 Den. 236. See also *R. v. Owen*, 1888, 20 Q. B. D. 829, as explained in *R. v. Paul*, 1890, 25 Q. B. D. 202.

³⁵ *R. v. Scott*, 1856, 1 D. & B. 47; 25 L. J. M. C. 128; *R. v. Robinson*, 1867, 1 C. C. R. 80; *R. v. Widdop*, 1872, L. R. 2 C. C. 5; *R. v. Erdheim*, [1896], 2 Q. B. 260.

³⁶ *R. v. Chidley & Cummins*, 1860, 8 Cox, C. C. 365.

AMERICAN NOTE.

GENERAL.

Authorities.—6 Am. & Eng. Encyclopædia of Law (2d ed.), p. 562; 1 Greenleaf on Evidence (15th ed.), sec. 224–227; *State v. Witham*, 72 Me. 531; *State v. Gilman*, 51 Me. 209.

CONNECTICUT.

State v. Coffee, 56 Conn. 399.

MASSACHUSETTS.

Com. v. King, 8 Gray, 501; *Com. v. Bradford*, 126 Mass. 42; *Com. v. Wesley*, 166 Mass. 248, 44 N. E. 228; *Com. v. Myers*, 160 Mass. 530; *Com. v. Brown*, 103 Mass. 422; *Com. v. Denehy*, 103 Mass. 424, note.

ARTICLE 24.

CONFESSION MADE UNDER A PROMISE OF SECRECY.

If a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.³⁷

AMERICAN NOTE.

GENERAL.

Authorities.—6 Am. & Eng. Encyclopædia of Law, pp. 534, 535, 570; 2 Taylor on Evidence (Chamberlayne's 9th ed.), p. 588¹².

³⁷ Cases collected and referred to in 1 Ph. Ev. 420, and Taylor, 881. See, too, Joy, sections iii., iv., v.

Promise of secrecy.—*State v. Squires*, 48 N. H. 367.

No warning.—A warning to the accused that he need not confess is not necessary, but if given is relevant to show that the confession was voluntary. *State v. Gilman*, 51 Me. 206.

CONNECTICUT.

Promise of secrecy.—*State v. Thomson*, Kirb. 345.

MASSACHUSETTS.

Promise of secrecy.—*Com. v. Knapp*, 9 Pick. 496.

Obtained by deception.—See *Com. v. Dana*, 2 Metc. 329.

While drunk.—A confession made while under the influence of liquor is admissible, but not if so drunk as not to understand the nature of the confession. *Com. v. Howe*, 9 Gray, 110.

No warning.—*People v. Cuffee*, 108 Mass. 285; *Com. v. Robinson*, 165 Mass. 429, 43 N. E. 121.

ARTICLE 25.

STATEMENTS BY DECEASED PERSONS WHEN DEEMED TO BE RELEVANT.

Statements written or oral of facts in issue or relevant or deemed to be relevant to the issue are deemed to be relevant, if the person who made the statement is dead, in the cases, and on the conditions, specified in Articles 26-31, both inclusive. In each of those articles the word "declaration" means such a statement as is herein mentioned, and the word "declarant" means a dead person by whom such a statement was made in his lifetime.

AMERICAN NOTE.

GENERAL.

Authorities.—9 Am. & Eng. Encyclopædia of Law (2d ed.), p. 6 *et seq.*; 1 Greenleaf on Evidence (15th ed.), sec. 123; *Putnam v. Fisher*, 52 Vt. 191.

It is no ground for admitting a declaration of a living person that he cannot be produced as a witness. *Churchill v. Smith*, 16 Vt. 560.

CONNECTICUT.

Under the statute.—In actions by or against the representatives of deceased persons, the entries, memoranda, and declarations of the deceased, relevant to the matter in issue, may be received as evidence; and in actions by or against the representatives of deceased persons, in which any trustee or receiver is an adverse party, the testimony of the deceased, relevant to the matter in issue, given at his examination, upon the application of said trustee or receiver, shall be received in evidence. But in actions against the representatives of deceased persons, no acknowledgment or promise shall be sufficient evidence of a new or continuing contract to take the case out of the statute of limitations, unless the same be contained in some writing made or signed by the person to be charged thereby; but this provision shall not alter the effect of any payment of principal or interest. Gen. Stats., sec. 1094.

Distributee of the property of a deceased person is a "representative." *Pixley v. Eddy*, 56 Conn. 338.

Under this statute a statement to a physician, as to an internal injury received in a collision, which was the subject of a suit, the injury then being healed, and the statement being made six months after the injury and not with reference to treatment, was not admissible nor was it admissible under the general rules of evidence. *Rowland v. P., W. & B. R. Co.*, 63 Conn. 419.

It is not necessary to the admissibility of memoranda, under this statute, that they should in terms refer to the matter in controversy. It is enough if they can be shown to do so. *Peck v. Pierce*, 63 Conn. 313.

And an oral statement is admissible, which, though general in its terms, could be regarded as embracing the matter in question, its generality going to its weight. *Peck v. Pierce*, 63 Conn. 315.

In a controversy as to title to land, where each party claimed under a deed from the deceased, his declaration that he did not give a deed to one of the parties is not admissible. *Lockwood v. Lockwood*, 56 Conn. 107-110.

To constitute a person a representative of the deceased, he must take his estate in consequence of his death, as a devisee or heir, or else must be strictly a personal representative as executor or administrator. *Lockwood v. Lockwood*, 56 Conn. 110.

It does not affect the case that one of the parties was a son of the deceased and so his heir, where he claimed title only under a deed given him by his father in his lifetime. *Lockwood v. Lockwood*, 56 Conn. 110.

The statute does not include declarations of testators as to the meaning attached by them to their wills. *Chapman v. Allen*, 56 Conn. 167.

In an action to recover a legacy, it was held, that the declaration of a testator, made to his executors in the absence of his daughter, that \$1,000 given her in his lifetime was to be deducted from her legacy, was not admissible against her, where such declaration was received upon a question of her knowledge of her legal rights, and in nowise tended to prove such knowledge on her part. *Chapman v. Allen*, 56 Conn. 167.

The statute applies to claims presented against his estate, although not made the subject of an action. *Ensign v. Batterson*, 68 Conn. 298.

The declarations of a decedent, subsequent to the execution of a contract, in which it is claimed that he agreed to convey certain land, to the effect that he still owned and should not part with such land until paid therefor, are admissible in favor of his sole legatee and devisee when sued for the specific performance of the alleged contract. *Hurd v. Hotchkiss*, 72 Conn. 472.

An appeal from the probate of a will is not an "action" within the meaning of the statute. *Barber's Appeal*, 63 Conn. 412, 413.

Where a suit is brought and the plaintiff dies during its pendency and his executor enters, the case becomes one of an action by a representative of a deceased person, and a written memorandum left by the plaintiff is admissible. It makes no difference that the defendant has been defaulted and the case stands on a hearing in damages. *Rowland v. P., W. & B. R. R. Co.*, 63 Conn. 417.

But where the plaintiff during his lifetime had given his deposition covering the entire case, which had been introduced by his representative's counsel, it was held, that the written memorandum left by the plaintiff could not be admitted in addition. *Rowland v. P., W. & B. R. R. Co.*, 63 Conn. 417, 418.

The account-books of a deceased person, in which the entries are in his own handwriting, are admissible in a suit to recover the amount of an account, as written entries of a deceased person, under General Statutes, sec. 1094. *Setchel v. Keigwin*, 57 Conn. 478.

There is no presumption as to the correctness of such entries. *Setchel v. Keigwin*, 57 Conn. 478.

Nor as to the weight to be given them. *Setchel v. Keigwin*, 57 Conn. 478.

In an action by an administrator, a memorandum-book, containing entries by the deceased of occurrences and acts relevant to the issue, is proper evidence under the statute. *Douglas v. Chapin*, 26 Conn. 92.

If a man writes down several accounts of an occurrence, at different times, and either in different terms, or one a copy of another, any or all may be admissible in evidence after his decease, under General Statutes, sec. 1094. *Craft's Appeal*, 42 Conn. 153, 154.

In suits by the representatives of a deceased person, his letters, written to his counsel or others, containing statements as to the subject of the suit, may be admissible. *Bissell v. Beckwith*, 32 Conn. 517, 518.

And where the suit was a bill, brought by a woman's devisees for a reconveyance of land fraudulently obtained from her, they were regarded as her representatives, within the meaning of the statute. *Bissell v. Beckwith*, 32 Conn. 509.

Whether the written memoranda, left by a deceased wife, can be used against her husband in a suit relating to her separate property, *quære*. The court inclined to think that they might. *Bissell v. Beckwith*, 32 Conn. 519.

The statute applies only in favor of those who sue or defend in the interest of the estate, either as personal representatives, heirs and distributees, or purchasers by will. *Baxter v. Camp*, 71 Conn. 245.

It does not embrace purchasers by contract. *Baxter v. Camp*, 71 Conn. 245.

The parties were at issue as to whether the plaintiff's intestate had made a valid gift to the defendant of an interest in a certain vessel. It appeared that he had formerly transferred to X and Y, each, ten sixty-fourth interests in the vessel, and that afterwards X had made a bill of sale of his interest in favor of the defendant, and received an equal interest by a conveyance from Y. Held, that under the statute, the declarations must be testified to by one who heard them, and could not be supplied by evidence of the declarations of another person, since deceased, as to what the intestate said to him. The dead cannot thus be made to speak through the dead. *Brown v. Butler*, 71 Conn. 576.

Held, also, that the declarations of X, who was not a party to

the suit, were not admissible to show how he came to make the bill of sale to the defendant, nor the purpose of the intestate in the transaction. *Brown v. Butler*, 71 Conn. 576.

S had made a contract with the defendant to collect for him a claim, and, with the defendant's assent, made an arrangement with H (the plaintiff), an attorney, to assist him, and delivered to him his contract. S died. H brought suit against the defendant upon the contract with S, averring that it was assigned to him. The administrator of the estate of S moved to be admitted as a plaintiff. Held, that the declarations of S, now deceased, were admissible. *Hamilton v. Lamphear*, 54 Conn. 243.

MASSACHUSETTS.

Insanity in some States has the same effect as death so far as the question of admissibility of declarations is concerned. *Union Bank v. Knapp*, 3 Pick. 96, 109, 15 Am. Dec. 181; *Holbrook v. Gay*, 6 Cush. 215.

ARTICLE 26.*

DYING DECLARATION AS TO CAUSE OF DEATH.

A declaration made by the declarant as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, is deemed to be relevant

only in trials for the murder or manslaughter of the declarant;

and only when the declarant is shown, to the satisfaction of the judge, to have been in actual danger of death, and to have given up all hope of recovery at the time when his declaration was made.

Such a declaration is not irrelevant merely because it was intended to be made as a deposition before a magistrate, but is irregular.

Illustrations.

(a) The question is, whether A has murdered B.

B makes a statement to the effect that A murdered him.

* See Note XVII.

B at the time of making the statement has no hope of recovery, though his doctor had such hopes, and B lives ten days after making the statement. The statement is deemed to be relevant.³⁸

B, at the time of making the statement (which is written down), says something, which is taken down thus: "I make the above statement with the fear of death before me, and with no hope of recovery." B, on the statement being read over, corrects this to "with no hope at present of my recovery." B dies thirteen hours afterwards. The statement is deemed to be irrelevant.³⁹

(b) The question is, whether A administered drugs to a woman with intent to procure abortion. The woman makes a statement which would have been admissible had A been on his trial for murder. The statement is deemed to be irrelevant.⁴⁰

(c) The question is, whether A murdered B. A dying declaration by C that he (C) murdered B is deemed to be irrelevant.⁴¹

(d) The question is, whether A murdered B.

B makes a statement before a magistrate on oath, and makes her mark to it, and the magistrate signs it, but not in the presence of A, so that her statement was not a deposition within the statute then in force. B, at the time when the statement was made, was in a dying state, and had no hope of recovery. The statement is deemed to be relevant.⁴²

AMERICAN NOTE.

GENERAL.

Authorities.—10 Am. & Eng. Encyclopædia of Law (2d ed.), p. 360 *et seq.*; Underhill on Evidence, sec. 100 *et seq.*; *State v. Wagner*, 61 Me. 178, 195.

Even though written memoranda of the contents of the declaration were made, if they are lost, parol evidence may be admitted. *State v. Patterson*, 45 Vt. 308.

³⁸ *R. v. Mosley*, 1825, 1 Moo. 97.

³⁹ *R. v. Jenkins*, 1869, 1 C. C. R. 187.

⁴⁰ *R. v. Hind*, 1860, Bell, 253, following *R. v. Hutchinson*, 1824, 2 B. & C. 608 n., quoted in a note to *R. v. Mead*.

⁴¹ *Gray's Case*, 1841, Ir. Cir. Rep. 76.

⁴² *R. v. Woodcock*, 1789, 1 East, P. C. 356. In this case, Eyre, C. B., is said to have left to the jury the question, whether the deceased was not in fact under the apprehension of death? 1 Leach, 504. It is now settled that the question is for the judge.

Antecedent threats cannot be proven by such declarations. *State v. Wood*, 53 Vt. 560.

CONNECTICUT.

All the attendant circumstances are admissible to show the actual danger of death and that hope has been abandoned. *State v. Swift*, 57 Conn. 496.

Declarations as to the cause of death are not admissible in civil actions, brought for injuries resulting in death. *Daily v. N. Y., etc., R. R. Co.*, 32 Conn. 356, 87 Am. Dec. 176.

Declarations as to facts attending a murder, made by the victim in expectation of death, are admissible upon the trial for the murder. *State v. Smith*, 49 Conn. 379; *State v. McGowan*, 65 Conn. 381.

It is not essential to their admissibility that they should directly accuse the prisoner of being the assailant. *State v. Cronin*, 64 Conn. 304-306.

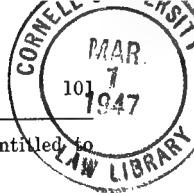
Such declarations may tend to show that the deceased was in actual danger of death, and had given up all hope; and if so, are admissible to lay a foundation for the admission of other declarations which do identify the prisoner as the assailant. *State v. Cronin*, 64 Conn. 304.

A statement of a murdered wife was offered with proof that she was in a dying condition, and was received without objection. Afterwards the testimony of a priest was offered to show that before the declaration he administered to her the last rites; the evidence being to show that she was conscious of being near death. Held, that it was strong evidence to prove her knowledge that she was in a dying condition. *State v. Swift*, 57 Conn. 505, 506.

Also held, that it made no difference that sufficient evidence of this had already been introduced and that the declaration had been admitted without objection, the State having the right to accumulate evidence. *State v. Swift*, 57 Conn. 505, 506.

Also held, that it made no difference that the evidence was received after the proof of the dying declaration, as the order of evidence was a matter of discretion. *State v. Swift*, 57 Conn. 505, 506.

Where the dying declarations of the murdered man had been given in evidence, and upon the petition for a new trial newly-discovered evidence was claimed to the effect that when the dying man made the declarations he dropped a word from which the witness inferred that he had some hope of living, it was held, that this being a mere inference of the witness, not in itself evidence, and it not being



stated what was said, the court could not regard it as entitled to consideration. *Hamlin v. State*, 48 Conn. 96.

MASSACHUSETTS.

Com. v. Casey, 11 Cush. 417, 421, 59 Am. Dec. 150; *Com. v. Richards*, 18 Pick. 437; *Maxwell v. Hardy*, 8 Pick. 561; *Com. v. Cooper*, 5 Allen, 495.

The declaration must be made in contemplation of death. *Com. v. Densmore*, 12 Allen, 535.

Dying declarations are not admissible in civil suits. *Thayer v. Lombard*, 165 Mass. 174, 42 N. E. 563.

The constitutional provision that one accused has a right to be confronted with his witnesses does not exclude evidence of this nature. *Com. v. Carey*, 12 Cush. 246.

Declarations of this nature are admissible if made in response to questions. *Com. v. Casey*, 11 Cush. 417.

Such a declaration may be made by signs. *Com. v. Casey*, 11 Cush. 417.

It is not necessary that the declarant die at once. They were admitted, although he lived seventeen days after making them. *Com. v. Cooper*, 5 Allen, 495.

By statute the dying declarations of a woman are admissible in a trial for attempt to procure abortion. Laws of 1889, c. 100; *Com. v. Bishop*, 165 Mass. 148.

All hope of recovery must have been abandoned. *Com. v. Roberts*, 108 Mass. 296; *Com. v. Brewer*, 164 Mass. 577.

A dying declaration may be admitted, even though written and sworn to. *Com. v. Haney*, 127 Mass. 455.

An intended deposition may be used as a memorandum to refresh the recollection. *Com. v. Haney*, 127 Mass. 455.

ARTICLE 27.*

DECLARATIONS MADE IN THE COURSE OF BUSINESS OR PROFESSIONAL DUTY.

A declaration is deemed to be relevant when it was made by the declarant in the ordinary course of business, and in

* See Note XVIII.

the discharge of professional duty, at or near the time when the matter stated occurred,⁴³ and of his own knowledge.

Such declarations are deemed to be irrelevant except so far as they relate to the matter which the declarant stated in the ordinary course of his business or duty, or if they do not appear to be made by a person duly authorised to make them.

Illustrations.

(a) The question is, whether A delivered certain beer to B.

The fact that a deceased drayman of A's on the evening of the delivery, made an entry to that effect in a book kept for the purpose, in the ordinary course of business, is deemed to be relevant.⁴⁴

(b) The question is, what were the contents of a letter not produced after notice.

A copy entered immediately after the letter was written, in a book kept for that purpose, by a deceased clerk, is deemed to be relevant.⁴⁵

(c) The question is, whether A was arrested at Paddington, or in South Molton Street.

A certificate annexed to the writ by a deceased sheriff's officer, and returned by him to the sheriff, is deemed to be relevant so far as it relates to the fact of the arrest; but irrelevant so far as it relates to the place where the arrest took place.⁴⁶

(d) The course of business was for A, a workman in a coal-pit, to tell B, the foreman, what coals were sold, and for B (who could not write) to get C to make entries in a book accordingly.

The entries (A and B being dead) are deemed to be irrelevant, because B, for whom they were made, did not know them to be true.⁴⁷

(e) The question is, what is A's age. A statement by the incumbent in a register of baptisms that he was baptised on a given day is deemed to be relevant. A statement in the same register that he was

⁴³ *Doe v. Turford*, 1832, 3 B. & Ad. 890.

⁴⁴ *Price v. Torrington*, 1703, 2 Smith's L. C. 311.

⁴⁵ *Pritt v. Fairclough*, 1812, 3 Camp. 305.

⁴⁶ *Chambers v. Bernasconi*, 1834, 1 C. M. & R. 347; see, too, *Smith v. Blakey*, 1867, L. R. 2 Q. B. 326.

⁴⁷ *Brain v. Preece*, 1843, 11 M. & W. 773.

born on a given day is deemed to be irrelevant, because it was not the incumbent's duty to make it.⁴⁸

(f) The question is, whether A was married. Proceedings in a college book, which ought to have been but was not signed by the registrar of the college, were held to be irrelevant.⁴⁹

AMERICAN NOTE.

GENERAL.

Authorities.—2 Taylor on Evidence (Chamberlayne's 9th ed.), sec. 697 *et seq.*; McKelvey on Evidence, p. 239 *et seq.*; *Wheeler v. Walker*, 45 N. H. 355; *Lassone v. Boston, etc., R. R. Co.*, 66 N. H. 345; *Barber v. Bennett*, 58 Vt. 476, 56 Am. Rep. 565.

Under certain circumstances, entries made from two to four weeks after the occurrences, are admissible. *Hall v. Glidden*, 39 Me. 445.

Books of account.—By the early common law, books of account, as such, were inadmissible. In this country they are admissible, both against and in favor of the person keeping them, when properly authenticated. 9 Am. & Eng. Encyclopædia of Law (2d ed.), p. 903; 2 Taylor on Evidence (American edition of 1897), p. 4631 *et seq.*; *Augusta v. Windsor*, 19 Me. 317; *Lassone v. B., etc., R. R. Co.*, 66 N. H. 345.

If the ledger is the book of original entry, it is admissible as such. *Swain v. Cheney*, 41 N. H. 232.

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When relevant.—(First paragraph of the text.) *Abel v. Fitch*, 20 Conn. 96.

Entries duly authenticated are admissible even though they record facts communicated by others. *Smith v. Law*, 47 Conn. 431.

In some States such declarations are admissible when the declarant has gone to parts unknown. *New Haven, etc., Co. v. Goodwin*, 42 Conn. 230.

Or is insane. *Bridgewater v. Rowbury*, 54 Conn. 213.

But not if he is competent and within the State. *Bartholomew v. Farwell*, 41 Conn. 107.

Where the person who made entries which are admissible in evidence is beyond the reach of process or is incompetent to testify, it

⁴⁸ *R. v. Clapham*, 1829, 4 C. & P. 29.

⁴⁹ *Fox v. Bearblock*, 1881, 17 Ch. Div. 429.

is the same as if he were dead, and his handwriting may be proved. *Bridgewater v. Roxbury*, 54 Conn. 216.

In a suit for supplies furnished by the plaintiff to a pauper, a selectman testified to having employed a physician to attend the pauper and to his having been paid by the town, but he could not fix the date of the attendance. Held, that entries upon the account-book of the physician (who had since become mentally incompetent), made in the regular course of his business, charging the town with the date, and crediting the town with payment, were admissible for the purpose of showing the time when the service was rendered. *Bridgewater v. Roxbury*, 54 Conn. 216.

Books of account.—*Terrill v. Beecher*, 9 Conn. 344.

The plaintiff's shop-books, regularly kept, are admissible in his favor in an action for goods sold, although the delivery of the goods may be admitted and the only defense is that they were taken for sale on commission, and although the entries were made from information given by his agent of a transaction at a distant place. *Smith v. Law*, 47 Conn. 435.

A agreed to take from the land of B oak bark, for his tannery, at \$1 a cord. In an action for the price of bark taken, it was held, that the original book kept by A's clerk, who was deceased, in which it was his duty and custom to enter the receipt of each load, was admissible for A to show, not only that the quantity entered was received, but also that no more was received than was entered. *Livingston v. Tyler*, 14 Conn. 498.

Entries in partnership books of account, made in the regular course of business by one of the firm, who has since gone to parts unknown and cannot be had as a witness, are admissible in favor of the partnership. *New Haven & Northampton Co. v. Goodwin*, 42 Conn. 231.

Under General Statutes, section 1041, as extended by section 31 of the Practice Act, shop-books are admissible, not only to prove a sale and delivery but to show a sale to the one to whom the goods are charged. *Plumb v. Curtis*, 66 Conn. 162.

Except in actions of book debt and kindred proceedings for the adjustment of matters of account, a party's own books cannot be received in evidence, unless the person who made the entries, if living, competent, and within the jurisdiction, is called to verify them. *Bartholomew v. Farwell*, 41 Conn. 109.

This principle applies to the case of an insolvent corporation whose books of account are offered by its receivers, on a bill in

equity to establish their title to land held by the respondent, but which, as they claim, was paid for by the corporation. *Bartholomew v. Farwell*, 41 Conn. 110.

Nor did it render them admissible that the respondent had been one of the managers and directors, without proof of his actual knowledge of, or right or duty of access to the entries. *Bartholomew v. Farwell*, 41 Conn. 111.

The payee of a note given for a book account may support the note by producing his book containing the account, with the testimony of his bookkeeper to its correctness and regularity. *Weeden v. Hawes*, 10 Conn. 55.

The plaintiff in a bill for an account introduced his shop-books, accompanied by proof of the propriety of most of the charges but without producing his bookkeeper, who was living in a neighboring State. Held, that they were admissible. *Butler v. Cornwall Iron Co.*, 22 Conn. 360, 361.

A creditor's bill to set aside a deed, purporting to have been given to carry out an agreement by A, the grantor, to pay a debt due the grantee from B, and to indemnify the grantee against responsibilities assumed by him for B, averred that, in fact, the deed was without consideration. Held, that the grantee might show, by the books of account between A and himself, that B owed him for money fraudulently advanced to him by A out of the grantee's funds; as this showed a consideration for the agreement recited in the deed. *Pomeroy v. Manin*, 2 Paine, 488, 489.

The account of a party against a stranger, in his own handwriting, is not inadmissible against such party because not signed by him. *Nichols v. Alsop*, 10 Conn. 268.

To meet evidence that a party was without pecuniary responsibility, his account-books, showing entries of debts due to him, are not admissible in his favor, when unaccompanied with any proof of the time when such entries were made, or of the fairness of the books, or that they contain accounts of credits as well as debts, or other corroborating circumstances. *Smith v. Vincent*, 15 Conn. 12.

An entry in a shop-book, made by one who is living, competent and within reach, cannot be introduced as evidence without his testimony to support it. *Stiles v. Homer*, 21 Conn. 511.

Books of third parties containing entries by a person, since deceased, are admissible. And such books cannot be impeached by evidence of declarations made by the person who kept them long after the entries were made. *Ashmead v. Colby*, 26 Conn. 310.

The question being whether certain interest had been paid by a party, deceased, an account-book kept by him was offered to show that it was not, the book containing many entries of payment of interest to other persons, but none of the interest in question. Held, not necessary that it be shown to contain entries of all the party's payments of interest, that matter affecting its weight and not its admissibility. *Peck v. Pierce*, 63 Conn. 314.

MASSACHUSETTS.

Mason's Massachusetts Practice, p. 465.

Admissibility.—*Welsh v. Barrett*, 15 Mass. 380, 383; *Riley v. Boehm*, 167 Mass. 183; *Jones v. Howard*, 3 Allen, 223.

As to the authentication of entries in books, see *Anderson v. Edwards*, 123 Mass. 273; *Pratt v. White*, 132 Mass. 477; *Holbrook v. Gay*, 6 Cush. 215.

The register of a notary is admissible to prove official acts with reference to dishonored paper. *Porter v. Judson*, 1 Gray, 175.

Memoranda of a surveyor are admissible under this article. *Walker v. Curtis*, 116 Mass. 98.

And those of a parish priest likewise. *Kennedy v. Doyle*, 10 Allen, 161; *Whitcher v. McLaughlin*, 115 Mass. 167.

So those of a hospital physician. *Townsend v. Pepperell*, 99 Mass. 40.

Insanity.—In some States such declarations are admissible on the insanity of the declarant. *Union Bank v. Knapp*, 3 Pick. 96.

Time when made.—*Matthews v. Westboro*, 134 Mass. 562.

The fact that the entries are made two or three days after the occurrences, does not, of itself, render them inadmissible. *Barker v. Haskell*, 9 Cush. 218.

Entries duly authenticated are admissible even though they record facts communicated by others. *Harwood v. Mulry*, 8 Gray, 250.

Illustration (d).—*Kent v. Garvin*, 1 Gray, 148; *Harwood v. Mulry*, 8 Gray, 250.

Illustration (e).—*Whitcher v. McLaughlin*, 115 Mass. 167; *Townsend v. Pepperell*, 99 Mass. 40; *Kennedy v. Doyle*, 10 Allen, 161.

Books of account.—A party's own books are admissible in most States, even to prove entries in his own favor. *Pratt v. White*, 132 Mass. 477; *Miller v. Shay*, 145 Mass. 162. But see *Kaiser v. Alexander*, 144 Mass. 71.

The book of original entries should be produced. *Stetson v. Wolcott*, 15 Gray, 545.

Even though this be a ledger. *Faxon v. Hollis*, 13 Mass. 427.

In some States entries in the books of the party making them are admissible, although in his own favor. *Donovan v. B., etc., R. R. Co.*, 158 Mass. 450.

Books of account must be proved by the one making the entries, or if he is dead, by his personal representative. *Pratt v. White*, 132 Mass. 477; *Cogswell v. Dolliver*, 2 Mass. 217; *Prince v. Smith*, 4 Mass. 455; *Frye v. Barker*, 2 Pick. 65; *Mathes v. Robinson*, 8 Metc. 269; *Ball v. Gates*, 12 Metc. 491; *Gibson v. Bailey*, 13 Metc. 537; *Arnold v. Sabin*, 1 Cush. 531.

If the party is insane his guardian may prove them. *Holbrook v. Gay*, 6 Cush. 215.

A shop-book, to be admissible, must have been kept in the regular course of business, under such circumstances as to import trustworthiness. Its character in this regard is to be passed upon by the judge. *Riley v. Boehm*, 167 Mass. 183.

A shop-book, kept by one who cannot write, consisting of mere marks, is admissible. *Miller v. Shay*, 145 Mass. 162.

The entries must have been practically contemporaneous. *Davis v. Sanford*, 9 Allen, 216; *Bentley v. Ward*, 116 Mass. 333; *Morris v. Briggs*, 3 Cush. 342; *Barker v. Haskell*, 9 Cush. 218.

Or must be connected with contemporaneous entries by the testimony of the one who transferred them. *Kent v. Garvin*, 1 Gray, 148; *Whitney v. Sawyer*, 11 Gray, 242.

ARTICLE 28.*

DECLARATIONS AGAINST INTEREST.

A declaration is deemed to be relevant if the declarant had peculiar means of knowing the matter stated, if he had no interest to misrepresent it, and if it was opposed to his pecuniary or proprietary interest.⁵⁰ The whole of any such declaration, and of any other statement referred to in it is deemed to be relevant, although matters may be stated

* See Note XIX.

⁵⁰ These are almost the exact words of Bayley, J., in *Gleadow v. Atkin*, 1833, 1 Crompt. & M. at p. 423. The interest must not be too remote: *Smith v. Blakey*, 1867, L. R. 2 Q. B. 326.

which were not against the pecuniary or proprietary interest of the declarant; but statements, not referred to in, or necessary to explain such declarations, are not deemed to be relevant merely because they were made at the same time or recorded in the same place.⁵¹

A declaration may be against the pecuniary interest of the person who makes it, if part of it charges him with a liability, though other parts of the book or document in which it occurs may discharge him from such liability in whole or in part, and [it seems] though there may be no proof other than the statement itself either of such liability or of its discharge in whole or part.⁵²

A statement made by a declarant holding a limited interest in any property and opposed to such interest is deemed to be relevant only as against those who claim under him, and not as against the reversioner.⁵³

An endorsement or memorandum of a payment made upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment was made, is not sufficient proof of such payment to take the case out of the operation of the Statutes of Limitation;⁵⁴ but any such declaration made in any other form by or by the direction of the person to whom the payment was made is, when such person is dead, sufficient proof for the purpose aforesaid.⁵⁵

⁵¹ Illustrations (a) (b) and (c).

⁵² Illustrations (d) and (e).

⁵³ Illustration (g); see Lord Campbell's judgment in case there quoted, at p. 177.

⁵⁴ 9 Geo. IV. c. 14, s. 3.

⁵⁵ *Bradley v. James*, 1853, 13 C. B. 822. *Newbould v. Smith*, 1885,

Any indorsement or memorandum to the effect above mentioned made upon any bond or other specialty by a deceased person, is regarded as a declaration against the proprietary interest of the declarant for the purpose above mentioned, if it is shown to have been made at the time when it purports to have been made;⁵⁶ but it is uncertain whether the date of such indorsement or memorandum may be presumed to be correct without independent evidence.⁵⁷

Statements of relevant facts opposed to any other than the pecuniary or proprietary interest of the declarant are not deemed to be relevant as such.⁵⁸

Illustrations.

(a) The question is, whether a person was born on a particular day.

An entry in the book of a deceased man-midwife in these words is deemed to be relevant:⁵⁹

“ W. Fowden, Junr.’s wife,
Filius circa hor. 3 post merid. natus H.
W. Fowden, Junr.,
App. 22, filius natus,
Wife, £1 6s. 1d.,

Pd. 25 Oct., 1768.”

29 Ch. Div. 882, seems scarcely consistent with this. It was a decision of North, J. On appeal, 1886, 33 Ch. Div. 127, the Court expressed no opinion on the admissibility of the entry rejected by North, J.; and see, too, the appeal to the House of Lords, 1889, 14 App. Ca. 423, where the same was the case.

⁵⁶ 3 & 4 Will. IV. c. 42, which is the Statute of Limitations relating to Specialties, has no provision similar to 9 Geo. IV. c. 14, s. 3. Hence, in this case the ordinary rule is unaltered.

⁵⁷ See the question discussed in 2 Ph. Ev. 302–305, and Taylor, ss. 692–696; and see Article 85.

⁵⁸ Illustration (h).

⁵⁹ *Higham v. Ridgway*, 2 Smith’s L. C. 318.

(g) The question is, whether there is a right of common over a certain field.

A statement by A, a deceased tenant for a term of the land in question, that he had no such right, is deemed to be relevant as against his successors in the term, but not as against the owner of the field.⁶⁶

(h) The question is, whether A was lawfully married to B.

A statement by a deceased clergyman that he performed the marriage under circumstances which would have rendered him liable to a criminal prosecution, is not deemed to be relevant as a statement against interest.⁶⁷

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GENERAL.

Authorities.—9 Am. & Eng. Encyclopædia of Law (2d ed.), p. 7; 1 Greenleaf on Evidence (15th ed.), sec. 147 *et seq.*; 2 Taylor on Evidence (Chamberlayne's 9th ed.), sec. 668 *et seq.*; *Rand v. Dodge*, 17 N. H. 343, 360.

Death of declarant.—The declaration is admitted only on proof of death. *Davis v. Fuller*, 12 Vt. 178, 36 Am. Dec. 334.

Must be against interest.—*Hinkley v. Davis*, 6 N. H. 210, 25 Am. Dec. 457; *Chase v. Smith*, 5 Vt. 556.

Statute of limitations.—Maine Rev. Stat., c. 81, sec. 100, is similar to 9 Geo. IV., c. 14, sec. 3, cited in the note. *Libby v. Brown*, 78 Me. 492.

Indorsements.—Modifying the rule of the text: *Clap v. Ingersol*, 2 Fairf. (Me.) 83; *Coffin v. Bucknam*, 3 Fairf. (Me.) 471. See *Clough v. McDaniel*, 58 N. H. 201.

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Death of declarant.—The declaration is admitted only on proof of death. *Fitch v. Chapman*, 10 Conn. 8.

Must be against interest.—*Dwight v. Brown*, 9 Conn. 83, 92.

A declaration in disparagement of title is admissible under this article. *Potter v. Waite*, 55 Conn. 236, 10 Atl. 563.

An indorsement, after the statute has run, is not a declaration against interest. *Coon's Appeal*, 52 Conn. 186.

⁶⁶ *Papendick v. Bridgewater*, 1855, 5 E. & B. 166.

⁶⁷ *Sussex Peerage Case*, 1844, 11 C. & F. at p. 108.

MASSACHUSETTS.

It has been held, although contrary to the weight of authority, that the declaration must be in writing. *Lawrence v. Kimball*, 1 Metc. 527. But see *Framingham Mfg. Co. v. Barnard*, 2 Pick. 533; *Jones v. Howard*, 3 Allen, 223.

Declaration as to title may be oral. *Marcy v. Stone*, 8 Cush. 4.

Death of declarant.—Declarant must be dead. *Currier v. Gale*, 14 Gray, 504.

Must be against interest.—*Com. v. Densmore*, 12 Allen, 537.

The interest must be pecuniary. *Com. v. Chabcock*, 1 Mass. 143

Declarations of a deceased landowner are admissible to prove a right of way over it. *Rowell v. Doggett*, 143 Mass. 483.

A declaration of a former owner in disparagement of title, is admissible under this article. *Inhabitants of West Cambridge v. Inhabitants of Lexington*, 2 Pick. 536.

Statute of limitations.—Massachusetts Public Statutes, c. 197, sec. 16, is similar to 9 Geo. IV., c. 14, sec. 3, cited in the note.

ARTICLE 29.

DECLARATIONS BY TESTATORS AS TO CONTENTS OF WILL.

The declarations of a deceased testator as to his testamentary intentions, and as to the contents of his will, are deemed to be relevant

when his will has been lost, and when there is a question as to what were its contents; and

when the question is whether an existing will is genuine or was improperly obtained; and

when the question is whether any and which of more existing documents than one constitute his will.

In all these cases it is immaterial whether the declarations were made before or after the making or loss of the will.⁶⁸

⁶⁸ *Sugden v. St. Leonards*, 1876, L. R. 1 P. D. (C. A.) 154: and see *Gould v. Lakes*, 1880, L. R. 6 P. D. 1. In questions between the heir

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Authorities.—2 Taylor on Evidence (Chamberlayne's 9th ed.), sec. 120³ A; McKelvey on Evidence, p. 213; *Collagan v. Burns*, 57 Me. 449.

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On the issue of undue influence, declarations are admissible. *Denison's Appeal*, 29 Conn. 402; *Canada's Appeal*, 47 Conn. 463.

In ejectment, evidence of directions to the scrivener to make a different disposition than that made, is inadmissible. *Chappel v. Avery*, 6 Conn. 34.

Lost will.—*In re Johnson's Will*, 40 Conn. 587.

Different wills.—On the question of admitting a will to probate, declarations of the testator that he meant a prior will to take effect and supposed it would, are admissible. *Canada's Appeal*, 47 Conn. 463.

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As to text, see *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322; *Leonard v. Quinlan*, 121 Mass. 579.

ARTICLE 30.⁶⁹

DECLARATIONS AS TO PUBLIC AND GENERAL RIGHTS.

Declarations are deemed to be relevant (subject to the third condition mentioned in the next article) when they

and the legatee or devisor such statements would probably be relevant as admissions by a privy in law, estate, or blood. *Gould v. Lakes*, 1880, L. R. 6 P. D. 1; *Doe v. Palmer*, 1851, 16 Q. B. 747. The decision in this case at p. 757, followed by *Quick v. Quick*, 1864, 3 Sw. & Tr. 442, is overruled by *Sugden v. St. Leonards*.

⁶⁹ See Note XX. Also see *Weeks v. Sparke*, 1813, 1 M. & S. 679; *Crease v. Barrett*, 1835, 1 C. M. & R. 919. Article 5 has much in common with this article. Lord Blackburn's judgment in *Neill v. Duke of Devonshire*, 1882, L. R. 8 App. Ca., pp. 186, 187, especially explains the law.

relate to the existence of any public or general right or custom or matter of public or general interest. But declarations as to particular facts from which the existence of any such public or general right or custom or matter of public or general interest may be inferred, are deemed to be irrelevant.

A right is public if it is common to all Her Majesty's subjects, and declarations as to public rights are relevant whoever made them.

A right or custom is general if it is common to any considerable number of persons, as the inhabitants of a parish, or the tenants of a manor.

Declarations as to general rights are deemed to be relevant only when they were made by persons who are shown, to the satisfaction of the judge, or who appear from the circumstances of their statement, to have had competent means of knowledge.

Such declarations may be made in any form and manner.

Illustrations.

(a) The question is, whether a road is public.

A statement by A (deceased) that it is public is deemed to be relevant.⁷⁰

A statement by A (deceased) that he planted a willow (still standing) to show where the boundary of the road had been when he was a boy is deemed to be irrelevant.⁷¹

(b) The following are instances of the manner in which declarations as to matters of public and general interest may be made:— They may be made in

Maps prepared by or by the direction of persons interested in the matter;⁷²

⁷⁰ *Crease v. Barrett*, per Parke, B., 1835, 1 C. M. & R. at p. 929.

⁷¹ *R. v. Bliss*, 1837, 7 A. & E. 550.

⁷² Implied in *Hammond v. Bradstreet*, 1854, 10 Ex. 390, and *Pipe v.*

Copies of Court rolls;⁷³

Deeds and leases between private persons;⁷⁴

Verdicts, judgments, decrees, and orders of Courts, and similar bodies⁷⁵ if final.⁷⁶

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Authorities.—9 Am. & Eng. Encyclopædia of Law (2d ed.), p. 9; 2 Taylor on Evidence (Chamberlayne's 9th ed.), sec. 607 *et seq.*; *Lawrence v. Tennant*, 64 N. H. 543; *Hampson v. Taylor*, 15 R. I. 83.

Ancient deeds and wills are sometimes admissible to prove private matters. *Oldtown v. Shapleigh*, 33 Me. 278; *Greenfield v. Camden*, 74 Me. 56.

Ancient records.—See *Willey v. Portsmouth*, 35 N. H. 303.

Ancient records of a town, showing the location of a highway, are admissible. *State v. Vale Mills*, 63 N. H. 4.

Maps.—As to the admissibility of maps, see *Smith v. Forrest*, 49 N. H. 230.

Private boundaries.—The declarations of a landowner as to the location of his boundaries, made while pointing them out, are admissible. *Royal v. Chandler*, 83 Me. 150; *Child v. Kingsbury*, 46 Vt. 47; *Powers v. Silby*, 41 Vt. 288. *Contra*, *Chapman v. Twitchell*, 37 Me. 59.

They have been held admissible in some States, if not made while pointing out boundaries. *Smith v. Forrest*, 49 N. H. 230; *Lawrence v. Tennant*, 64 N. H. 532; *Great Falls v. Worster*, 15 N. H. 437.

It has been held that if it was for the interest of the declarant to misstate at the time he made the declaration, it is inadmissible. *Child v. Kingsbury*, 46 Vt. 47, 53.

The rule as to declarations, with reference to private boundary, is confined to monuments and lines and boundaries, but does not extend to acts of ownership, or possession, or to any other facts. *Wendall v. Abbott*, 45 N. H. 349.

Fulcher, 1858, 1 E. & E. 111. In each of these cases the map was rejected as not properly qualified.

⁷³ *Crease v. Barrett*, 1835, 1 C. M. & R. at p. 928.

⁷⁴ *Plaxton v. Dare*, 1829, 10 B. & C. 17.

⁷⁵ *Duke of Newcastle v. Broxtowe*, 1832, 4 B. & Ad. 273.

⁷⁶ *Pim v. Currell*, 1840, 6 M. & W. 234, 266.

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Authorities.—*Wooster v. Butler*, 13 Conn. 309; *S. W. Sch. Dist. v. Williams*, 48 Conn. 504.

Particular facts inadmissible.—Sustaining text: *S. W. Sch. Dist. v. Williams*, 48 Conn. 504.

In a controversy as to the title to land upon which a schoolhouse stood it was held, that the date of the erection of the schoolhouse could not be thus proved. *Southwest School District v. Williams*, 48 Conn. 506–508.

The location of a highway may be shown by reputation. *Noyes v. Ward*, 19 Conn. 250, 269.

To show the existence of an ancient highway in a particular place, which comes in question in an action of ejectment, testimony from aged men is admissible, that, when young, they heard old men, since dead, say that there was such a highway. *Wooster v. Butler*, 13 Conn. 316.

Private boundaries.—Private boundary may be proved by declarations. *Kinney v. Farnsworth*, 17 Conn. 355, and other cases under Article 18.

MASSACHUSETTS.

Authorities.—*Drury v. Midland R. R. Co.*, 127 Mass. 571; *Dillingham v. Snow*, 5 Mass. 552.

The position of a line separating two towns is a matter of public interest, and declarations are admissible, even though they concern the position of a single house, as related to that line. *Abington v. North Bridgewater*, 23 Pick. 170, 174.

The incorporation of a town may be proved by declarations. *Dillingham v. Snow*, 5 Mass. 547.

Declarations as to private rights are generally inadmissible. *Boston, etc., Co. v. Hanlon*, 132 Mass. 483.

Ancient deeds and wills are sometimes admissible to prove private matters. *Ward v. Oxford*, 8 Pick. 476; *Wright v. Boston*, 126 Mass. 161.

Particular facts inadmissible.—*Hall v. Mayo*, 97 Mass. 416.

Deeds and leases.—*Drury v. Midland R. R. Co.*, 127 Mass. 571.

Private boundaries.—Private boundary may not be proved by declarations of deceased persons not accompanying any act performed upon the land. *Hayden v. Stone*, 121 Mass. 413.

Declarations of a deceased owner of land, as to his boundary, made while in possession, and in the act of pointing out his boundaries,

are admissible if no interest to misrepresent them at the time existed. *Currier v. Gale*, 14 Gray, 504; *Wood v. Foster*, 8 Allen, 24; *Daggett v. Shaw*, 5 Metc. 223; *Bartlett v. Emerson*, 7 Gray, 171; *Davis v. Sherman*, 7 Gray, 291; *Holmes v. Turner's Falls Co.*, 150 Mass. 535.

The declarant must be dead. *Flagg v. Mason*, 8 Gray, 556; *Whitney v. Bacon*, 9 Gray, 206.

Under this rule the declarations of owners and tenants in possession only are admissible. *Bartlett v. Emerson*, 7 Gray, 174.

The declarations of one holding under a bond for a deed may be admissible. *Niles v. Patch*, 13 Gray, 254.

Boundary cannot be shown by tradition. *Hall v. Mayo*, 97 Mass. 416.

The evidence is admitted to prove the location of the boundary only. *Van Deusen v. Turner*, 12 Pick. 532.

While the Massachusetts rule has been adopted by the Supreme Court of the United States (*Hunnicutt v. Peyton*, 102 U. S. 333, 363), the Supreme Court of that State has declined to extend it further. *Peck v. Clark*, 142 Mass. 436.

ARTICLE 31.*

DECLARATIONS AS TO PEDIGREE.

A declaration is deemed to be relevant (subject to the conditions hereinafter mentioned) if it relates to the existence of any relationship between persons, whether living or dead, or to the birth, marriage, or death of any person, by which such relationship was constituted, or to the time or place at which any such fact occurred, or to any fact immediately connected with its occurrence.⁷⁷

Such declarations may express either the personal knowledge of the declarant, or information given to him by other

* See Note XXI.

77 Illustration (a).

persons qualified to be declarants, but not information collected by him from persons not qualified to be declarants.⁷⁸ They may be made in any form and in any document or upon anything in which statements as to relationship are commonly made.⁷⁹

The conditions above referred to are as follows:—

(1) Such declarations are deemed to be relevant only in cases in which the pedigree to which they relate is in issue, and not to cases in which it is only relevant to the issue;⁸⁰

(2) They must be made by a declarant shown to be legitimately related by blood to the person to whom they relate; or by the husband or wife of such a person.⁸¹

(3) They must be made before the question in relation to which they are to be proved has arisen; but they do not cease to be deemed to be relevant because they were made for the purpose of preventing the question from arising.⁸²

This condition applies also to statements as to public and general rights or customs and matters of public and general interest.

⁷⁸ *Davies v. Lowndes*, 1843, 6 M. & G. at p. 527.

⁷⁹ Illustration (d).

⁸⁰ Illustration (b).

⁸¹ *Shrewsbury Peerage Case*, 1857, 7 H. L. C. 26. For Scotch law, see *Lauderdale Peerage Case*, 1885, L. R. 10 App. Ca. 692; also *Lovat Peerage Case*, 1885, *ib.* 763. In *In re Turner, Glenister v. Harding*, 1885, 29 Ch. Div. 985, a declaration by a deceased reputed father of his daughter's illegitimacy was admitted on grounds not very clear to me: and on the authority of two *Nisi Prius* cases, *Morris v. Davies*, 1825, 3 C. & P. 215, and *Cope v. Cope*, 1833, 1 Mo. & Ro. 269. See note to Article 34.

⁸² *Berkeley Peerage Case*, 1811, 4 Cam. 401-417; and see *Lovat Peerage*, 1885, 10 App. Ca. 797.

Illustrations.

(a) The question is, which of three sons (Fortunatus, Stephanus, and Achaicus) born at a birth is the eldest.

The fact that the father said that Achaicus was the youngest, and he took their names from St. Paul's Epistles (see 1 Cor. xvi. 17), and the fact that a relation present at the birth said that she tied a string round the second child's arm to distinguish it, are relevant.⁸³

(b) The question is, whether A, sued for the price of horses and pleading infancy, was on a given day an infant or not.

The fact that his father stated in an affidavit in a Chancery suit to which the plaintiff was not a party, that A was born on a certain day, is irrelevant.⁸⁴

(c) The question is, whether one of the *cestuis que vie* in a lease for lives is living.

The fact that he was believed in his family to be dead is deemed to be irrelevant, as the question is not one of pedigree.⁸⁵

(d) The following are instances of the ways in which statements as to pedigree may be made: By family conduct or correspondence; in books used as family registers; in deeds and wills; in inscriptions on tombstones, or portraits; in pedigrees, so far as they state the relationship of living persons known to the compiler.⁸⁶

AMERICAN NOTE.

GENERAL.

Authorities.—18 Am. & Eng. Encyclopædia of Law (1st ed.), p. 258 *et seq.*; Abbott's Trial Evidence (2d ed.), p. 115 *et seq.*

What may be shown.—(First paragraph of text.) *Morrill v. Foster*, 33 N. H. 379.

There can be no evidence of pedigree, except such as consists of

⁸³ Vin. Abr., 1731, *tit.* Evidence, T. b. 91. The report calls the son Achicus.

⁸⁴ *Guthrie v. Haines*, 1884, 13 Q. B. D. 818. In this case all the authorities on this point are fully considered.

⁸⁵ *Whittuck v. Walters*, 1830, 4 C. & P. 375.

⁸⁶ In 1 Ph. Ev. 203–215; Taylor, ss. 648–652; and Roscoe's N. P. 44–46, these and many other forms of statement of the same sort are mentioned; and see *Davies v. Lowndes*, 1843, 6 M. & G. at pp. 526, 527.

the declarations of relatives of the family. *Inhabitants of South Hampton v. Fowler*, 54 N. H. 197.

As to what is embraced under "general reputation in the family," see *In re Hurlburt's Estate*, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794.

Family reputation, based upon declarations of deceased members, may be shown. *Hurlburt's Estate*, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794. See also *Eastman v. Martin*, 19 N. H. 152.

Death is a question of pedigree. *Webb v. Richardson*, 42 Vt. 465.

Place.—The place of birth cannot be thus shown. *Greenfield v. Camden*, 74 Me. 56; *Tyler v. Flanders*, 57 N. H. 618.

Nor can the former place of residence. *Londonderry v. Andover*, 28 Vt. 416.

Death of declarant.—The declarant must be dead. *Northrop v. Hale*, 76 Me. 306; *Mooers v. Bunker*, 29 N. H. 420.

Whose declarations admissible.—*Northrop v. Hale*, 76 Me. 306; *Waldron v. Tuttle*, 4 N. H. 371.

An authenticated copy of a record of a birth, made from a statement of the mother, is admissible. *Derby v. Salem*, 30 Vt. 722.

Slight proof of relationship is sufficient. *Northrop v. Hale*, 76 Me. 306, 309, 49 Am. Rep. 615.

Ante litem motam.—*Northrop v. Hale*, 76 Me. 306, 49 Am. Rep. 615.

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Hearsay evidence on questions of pedigree is not admissible, unless the party who made the declarations or entries can be named, and is deceased, and appears to have been a relative or a connection, or an inmate of the family, and to have made the declarations or entries under such circumstances as preclude any presumption of interest or bias. *Chapman v. Chapman*, 2 Conn. 349.

It is not enough to show a general declaration that such an one inherited a particular estate and was a relative of its former owner, but the particular relationship must be pointed out, and it must be such as to make the person indicated heir to such estate. *Chapman v. Chapman*, 2 Conn. 350.

Hearsay evidence (in this case declarations of a father since deceased, and a record in the family Bible) is not admissible to prove the place of birth. *Union v. Plainfield*, 39 Conn. 564, 565.

Death of declarant.—The declarant must be dead. *Chapman v. Chapman*, 2 Conn. 347, 7 Am. Dec. 277.

Place.—The place of birth cannot be thus shown. *Union v. Plainfield*, 39 Conn. 563.

Ante litem motam.—Sustaining text: *Chapman v. Chapman*, 2 Conn. 347.

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Whose declarations admissible.—*Haddock v. B. & M. R. R. Co.*, 3 Allen, 298, 81 Am. Dec. 656.

Common repute cannot be shown. *Blaisdell v. Bickum*, 139 Mass. 250.

What may be shown.—(First paragraph of the text.) *Haddock v. B. & M. R. R. Co.*, 3 Allen, 298.

One may testify as to his own age. *Com. v. Stevenson*, 142 Mass. 466.

And the jury may consider his personal appearance. *Com. v. Phillips*, 162 Mass. 504.

Place.—The place of birth cannot be thus shown. *Adams v. Swansea*, 116 Mass. 591, 596; *Wilmington v. Burlington*, 4 Pick. 174.

Pedigree in issue.—Modifying rule of the text. *North Brookfield v. Warren*, 16 Gray, 174.

Ante litem motam.—Sustaining text: *Com. v. Felch*, 132 Mass. 23.

Form.—Parchment pedigree and inscription on tombstone are admissible. *North Brookfield v. Warren*, 16 Gray, 171.

ARTICLE 32.*

EVIDENCE GIVEN IN FORMER PROCEEDINGS WHEN RELEVANT.

Evidence given by a witness in a previous action is relevant for the purpose of proving the matter stated in a subsequent proceeding, or in a later stage of the same proceeding, when the witness is dead,⁸⁷ or is mad,⁸⁸ or so ill that he will probably never be able to travel,⁸⁹ or is kept out of

* See Note XXII.

⁸⁷ *Mayor of Doncaster v. Day*, 1810, 3 Tau. 262.

⁸⁸ *R. v. Eriswell*, 1790, 3 T. R. 720.

⁸⁹ *R. v. Hogg*, 1833, 6 C. & P. 176.

the way by the adverse party,⁹⁰ or in civil, but not, it seems, in criminal, cases, is out of the jurisdiction of the Court,⁹¹ or, perhaps, in civil, but not in criminal, cases, when he cannot be found.⁹²

Provided in all cases —

(1) That the person against whom the evidence is to be given had the right and opportunity to cross-examine the declarant when he was examined as a witness;⁹³

(2) That the questions in issue were substantially the same in the first as in the second proceeding;⁹³

Provided also —

(3) That the proceeding, if civil, was between the same parties or their representatives in interest;⁹³

(4) That, in criminal cases, the same person is accused upon the same facts.⁹⁴

If evidence is reduced to the form of a deposition, the provisions of Article 90 apply to the proof of the fact that it was given.

The conditions under which depositions may be used as evidence are stated in Articles 140–142.

⁹⁰ *R. v. Scaife*, 1851, 17 Q. B. 238, 243.

⁹¹ *Fry v. Wood*, 1737, 1 Atk. 444; *R. v. Scaife*, 1851, 17 Q. B. at p. 243.

⁹² Godbolt, 1623, p. 326, case 418; *R. v. Scaife*, 1851, 17 Q. B. at p. 243.

⁹³ *Doe v. Tatham*, 1834, 1 A. & E. 3, 19; *Doe v. Derby*, 1834, 1 A. & E. 783, 785, 789. See, as a late illustration, as to privies in estate, *Llanover v. Homfray*, 1880, 19 Ch. Div. 224. In this case the first set of proceedings was between lords of the same manor and tenants of the same manor as the parties to the second suit.

⁹⁴ *Beeston's Case*, 1854, Dears. 405.

AMERICAN NOTE.

GENERAL.

Authorities.—11 Am. & Eng. Encyclopædia of Law (2d ed.), p. 523 *et seq.*; 1 Greenleaf on Evidence (15th ed.), sec. 163 *et seq.*

The rule allows the admission of evidence at a preliminary examination. *State v. Hooker*, 17 Vt. 658.

Former testimony before arbitrators may be proved. *Bailey v. Woods*, 17 N. H. 365.

The mere fact that the witness cannot recall the facts does not render the evidence competent. *Robinson v. Gilman*, 43 N. H. 295.

As to the testimony of parties, see *Blair v. Ellsworth*, 55 Vt. 415.

Deceased witness.—Sustaining text: *Watson v. Lisbon Bridge*, 14 Me. 201; *Orr v. Hadley*, 36 N. H. 575; *Glass v. Beach*, 5 Vt. 172; *Mathewson v. Sargeant*, 36 Vt. 142; *Johnson v. Powers*, 40 Vt. 611; *Earl v. Tupper*, 45 Vt. 275; *Chase v. Spring Vale Mills Co.*, 75 Me. 156.

Insane witness.—Sustaining text: *Whitaker v. Marsh*, 62 N. H. 477.

Illness of witness.—Illness is sometimes held sufficient to allow testimony to come in under the rule of this article. *Chase v. Spring Vale Mills Co.*, 75 Me. 156.

In criminal cases the illness of a witness does not render his former testimony admissible. *State v. Staples*, 47 N. H. 113.

The right to cross-examine in previous trial.—*Johnson v. Powers*, 40 Vt. 611; *Wheeler v. Walker*, 12 Vt. 427.

Same parties.—*Orr v. Hadley*, 36 N. H. 575; *Johnson v. Powers*, 40 Vt. 611; *Earl v. Tupper*, 45 Vt. 275; *Chase v. Spring Vale Mills Co.*, 75 Me. 156.

Similarity of issues.—*Orr v. Hadley*, 36 N. H. 575.

Who may testify.—Any one who heard the former testimony may give evidence as to what was said. *Emery v. Fowler*, 39 Me. 326.

As for instance an attorney. *Earl v. Tupper*, 45 Vt. 275.

The witness need state only the substance of the testimony. *Lime Rock Bank v. Hewett*, 52 Me. 531; *Emery v. Fowler*, 39 Me. 326, 63 Am. Dec. 627; *Wung v. Dearborn*, 22 N. H. 377; *Marsh v. Jones*, 21 Vt. 378, 52 Am. Dec. 67; *Williams v. Willard*, 23 Vt. 369; *Johnson v. Powers*, 40 Vt. 611.

The former testimony may be proved by the judge's minutes properly authenticated. *Johnson v. Powers*, 40 Vt. 611; *Whitcher v. Morey*, 39 Vt. 459.

Or by the minutes of the stenographer. *Quinn v. Halbert*, 57 Vt. 178.

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The rule allows the admission of evidence at a preliminary examination if the party against whom it is offered was present. *Rex v. Barber*, 1 Root, 76.

Deceased witness.—Sustaining text: *Lane v. Brainerd*, 30 Conn. 565.

Witness spirited away.—One under indictment induced a witness who had testified against him before the grand jury to go away, so that he could not be had before the petit jury. Held, that the State might prove what the witness stated before the grand jury. *Rex v. Barber*, 1 Root, 76.

Same parties.—*Lane v. Brainerd*, 30 Conn. 565.

Similarity of issues.—*Lane v. Brainerd*, 30 Conn. 565.

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The witness who relates the former testimony must give substantially the language used. *Costigan v. Lunt*, 127 Mass. 354; *Woods v. Keyes*, 14 Allen, 238, 92 Am. Dec. 766; *Warren v. Nichols*, 6 Metc. 267; *Corey v. Janes*, 15 Gray, 545; *Com. v. Richards*, 18 Pick. 434, 29 Am. Dec. 608; *Yale v. Comstock*, 112 Mass. 267.

Any one who heard the former testimony may give evidence as to what was said. *Woods v. Keyes*, 14 Allen, 236.

As for instance an attorney. *Costigan v. Lunt*, 127 Mass. 354.

The former testimony may be proved by the stenographer's minutes. *Yale v. Comstock*, 112 Mass. 267.

The rule allows the admission of evidence at a preliminary examination if the party against whom it is offered was present. *Com. v. Richards*, 18 Pick. 434, 29 Am. Dec. 608.

Deceased witness.—Sustaining text: *Woods v. Keyes*, 14 Allen, 238, 92 Am. Dec. 766; *Corey v. Janes*, 15 Gray, 543; *Com. v. Richards*, 18 Pick. 434, 29 Am. Dec. 608; *Warren v. Nichols*, 6 Metc. 261; *Yale v. Comstock*, 112 Mass. 267; *Costigan v. Lunt*, 127 Mass. 355; *Radclyffe v. Barton*, 161 Mass. 327.

Illness of witness.—In criminal cases the illness of a witness does not render his former testimony admissible. *Com. v. McKenna*, 158 Mass. 207.

Similarity of issues.—Sustaining text: *Melvin v. Whiting*, 7 Pick. 79; *Radclyffe v. Barton*, 161 Mass. 327.

SECTION II.

STATEMENTS IN BOOKS, DOCUMENTS, AND
RECORDS, WHEN RELEVANT.

ARTICLE 33.

RECITALS OF PUBLIC FACTS IN STATUTES AND
PROCLAMATIONS.

When any act of state or any fact of a public nature is in issue or is or is deemed to be relevant to the issue, any statement of it made in a recital contained in any public Act of Parliament, or in any Royal proclamation or speech of the Sovereign in opening Parliament, or in any address to the Crown of either House of Parliament, is deemed to be a relevant fact.⁹⁵

AMERICAN NOTE.

GENERAL.

Authorities.—9 Am. & Eng. Encyclopædia of Law, p. 880 *et seq.*; 3 Taylor on Evidence (Chamberlayne's 9th ed.), p. 1179 *et seq.*

The compendium of the tenth census, printed by authority of Congress, is admissible to show the population of a town. *Fulham v. Howe*, 60 Vt. 351, 14 Atl. 652.

MASSACHUSETTS.

Whiton v. Albany, etc., Ins. Co., 109 Mass. 24; *Worcester v. Northborough*, 140 Mass. 397.

Recitals in the official precept of the governor are within this article. *Com. v. Hall*, 9 Gray, 262.

⁹⁵ *R. v. Francklin*, 1731, 17 S. T. at p. 636, *et seq.*; *R. v. Sutton*, 1816, 4 M. & S. 532.

As are also those in official papers prepared in the adjutant-general's office, which are admissible to prove that a certain person was or was not assigned to a particular town as belonging to its quota of soldiers. *Worcester v. Northborough*, 140 Mass. 397, 5 N. E. 270.

ARTICLE 34.

RELEVANCY OF ENTRY IN PUBLIC RECORD MADE IN PERFORMANCE OF DUTY.

An entry in any record, official book, or register kept in any of Her Majesty's dominions or at sea, or in any foreign country, stating, for the purpose of being referred to by the public, a fact in issue or relevant or deemed to be relevant thereto, and made in proper time by any person in the discharge of any duty imposed upon him by the law of the place in which such record, book, or register is kept, is itself deemed to be relevant fact.⁹⁶

AMERICAN NOTE.

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Authorities.—3 Taylor on Evidence (American edition of 1897), p. 1179⁴⁰ *et seq.*; McKelvey on Evidence, p. 276; 9 Am. & Eng. Encyclopædia of Law (2d ed.), p. 882 *et seq.*

Statements contained in such documents as may be made in the regular course of duty are included. *Rindge v. Walker*, 61 N. H. 58.

⁹⁶ *Sturla v. Freccia*, 1880, 5 App. Ca. 623; see especially, pp. 633-4, and 643-5; *Lyell v. Kennedy*, 1889, 14 App. Ca. 437; Taylor, ss. 1591-1595. See also *Queen's Proctor v. Fry*, 1879, 4 P. D. 230. In *Robinson v. The Duke of Buccleuch and Queensbury*, 1887, 3 Times L. R. 472, the Court of Appeal held in a pedigree case that neither a baptism nor a burial certificate was evidence of the age of the person to whom they related. This had been previously doubted; see *In re Turner*; *Glenister v. Harding*, 1885, 29 Ch. Div. at pp. 990, 991; *Morris v. Davies*, 1825, 3 C. & P. 215; and *Cope v. Cope*, 1833, 1 Moo. & Rob. 269. See note to Article 31, *ante*, p. 118, note 81.

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Only such statements as are contained in such documents as may be made in the regular course of duty are included. *Erwin v. English*, 61 Conn. 502.

Marriage.—A certificate of marriage is treated in this State as an original document, and need not be authenticated as a copy. *Northrop v. Knowles*, 52 Conn. 525, 526; *Erwin v. English*, 61 Conn. 507.

In a prosecution under General Statutes, section 3402, for neglect to support a wife, it was held, that the marriage certificate was admissible as original evidence of the marriage. *State v. Schweitzer*, 57 Conn. 537.

A part of a deposition read as follows: "Sometime in the year 1867 my mother wrote to Father L, parish priest of G, who performed the marriage ceremony on the occasion of my father and mother, for a certificate of the marriage, and he returned to her the following certificate, in his handwriting: 'I hereby certify that P and M were lawfully married according to the rites of the Roman Catholic Church, on the 10th of August, 1843. Witnesses present on the occasion, H and A.'" Held, that the part of the deposition quoted, standing by itself, was not legal evidence, unless it appeared from the certificate itself that the priest who signed it performed the marriage ceremony. The certificate did not so state in terms, and it was doubtful if that was its import. *Erwin v. English*, 57 Conn. 564.

The rule with regard to the mode of proof of the marriage is the same in both civil and criminal cases. *Erwin v. English*, 61 Conn. 509.

Illustrations.—The record of a baptism made by the minister of a parish, since deceased, is evidence of the fact. *Huntly v. Compstock*, 2 Root, 100.

In determining whether ancient documents purporting to be original records, are in fact such, their general appearance, the place where they were found and the length of time during which they have been there, are all entitled to weight. The omission of the proper attestation does not destroy their character as records. *Enfield v. Ellington*, 67 Conn. 459.

To prove the lodgment for record of one deed before another, the testimony of the party who lodged both was given, and the indorsements of the town clerk, on the deeds, of the dates when they were

received were also introduced. Held no ground for a new trial; as they corroborated the witness, like any contemporaneous memorandum. *Beers v. Broome*, 4 Conn. 256.

To prove that goods attached and replevied were the same goods bought by the plaintiff in replevin from a trustee in insolvency, the defendant offered in evidence a certified copy of the inventory of the insolvent estate and one of the several schedules referred to therein. Held, that the evidence was properly admitted. *Fielding v. Silverstein*, 70 Conn. 605.

A certified copy of a writ of error is no evidence, in another proceeding, of the record and judgment, to reverse which the writ was brought. *Betts v. New Hartford*, 25 Conn. 185.

A copy from the records of the Superior Court of an execution issued therefrom and returned with an indorsement of a levy on land, and of the certificate of the town clerk annexed to the return, that the same had been recorded on the town records, is good evidence of title, without producing a copy from the town records. *Otis v. Abel*, 2 Root, 522.

In forcible entry and detainer, the plaintiff, in proof of his possession, and its nature and extent, offered to show, by the testimony of an officer, and by a writ of restitution served and returned by such officer, that he had been put into possession under that writ before the ouster complained of. Held, admissible, although the record of the judgment of restitution was not introduced, and it was rendered against a stranger. *Lee v. Stiles*, 51 Conn. 505, 506.

In a suit by a school district, they can prove their votes by their records. *South School District v. Blakeslee*, 13 Conn. 235.

Evidence of appointment of overseer. The appointment of an overseer may be proved by a duplicate of his written appointment by the selectmen. *Mix v. Peck*, 13 Conn. 248.

The plaintiff testified that a building burned was worth \$3,500. It had been put into her tax list by her husband as her agent, at a valuation of \$800. Held, that this tax list was not admissible in evidence against her to show that the building was worth less than \$3,500, nor to contradict her testimony. *Martin v. N. Y. & N. E. R. R. Co.*, 62 Conn. 343.

The registry lists of electors and the original check lists used in the elections are competent evidence tending to prove the domicile of a person whose name appears thereon, and, if his name is checked on the latter lists, of the fact that he voted on such occasions. The case of *New Milford v. Sherman*, 21 Conn. 101, in so far as it is

inconsistent with this doctrine, is overruled. *Enfield v. Ellington*, 67 Conn. 459.

To prove that a certain trial was had at a certain time before a justice of the peace, the original files were admitted with parol evidence that they were such. Held, that this was probably proper, but that, at all events, no injury was done, as these facts could have been as well proved wholly by the parol evidence. *Phelps v. Hunt*, 43 Conn. 198.

A marine protest regularly proves itself and nothing more. It is not admissible as evidence in chief to prove the facts which are stated in it, though it may be read to contradict the testimony of those who made it. *Hempstead v. Bird*, 1 Day, 92, 93.

The Probate Court of N found that A resided in S at the time of his death, and admitted his will to probate there. Upon an application of the Probate Court of W for the probating of his will, the record of the proceedings of the Probate Court of N was introduced in opposition, for the purpose of showing that A was domiciled in S. Held, that the record was not conclusive, but that the Probate Court of W could receive parol evidence of his being domiciled in W. *Culver's Appeal*, 48 Conn. 173.

A certified copy of the doings of a meeting of a school district showed that a certain vote, otherwise material to the case, was not authorized by the warning. Held, that this evidence of the vote was inadmissible for any purpose. If evidence of the vote were admissible to show the sentiments of the majority present at the meeting, it could not be proved by a certified copy; since this can only prove matters on which the meeting could lawfully act. *Wilson v. Waltersville School District*, 44 Conn. 159, 160.

The certificate of the insurance commissioner, given to an agent of a foreign insurance company, under General Statutes, section 2905, is *prima facie* evidence of the compliance of the company with the requirements of the statute. *State v. Byrne*, 45 Conn. 280.

On the trial of an information for resisting an indifferent person deputed as an officer to serve legal process, the State offered, as evidence of the deputation and the existence of the process, the original writ, on which the deputation and oath were indorsed, but which had never been returned. Held, that the evidence was admissible as between the State and the accused, however the case might be as between him and the officer, as the offense was complete before the time for making a return. *State v. Moore*, 39 Conn. 251.

It is the duty of an administrator to inventory property fraud-

ulently conveyed, where it is needed for debts, and to institute proceedings to appropriate the property to that use. For the purpose of showing that the property is needed for debts, the report of the commissioners on the insolvent estate of the intestate is admissible. *Bassett v. McKenna*, 52 Conn. 439.

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Authorities.—*Gurney v. Howe*, 9 Gray, 404, 69 Am. Dec. 229; *Pells v. Webquish*, 129 Mass. 469.

The record of registered letters, at a post-office, is evidence, and need not be authenticated by the clerk. *Gurney v. Howe*, 9 Gray, 404.

Tax assessors' books are admissible in suits involving the issue of adverse possession. *Elwell v. Hinckley*, 138 Mass. 225.

And to show in whose name the property was assessed when the question arose on other issues. *Edson v. Munsell*, 10 Allen, 557.

A town clerk's record, kept in accordance with statute, is competent but not exclusive evidence as to the soldiers who comprised the town's quota. *Wayland v. Ware*, 104 Mass. 46; *Hanson v. South Scituate*, 115 Mass. 336.

The date of the trial of a case in the lower court may be shown on appeal by the record of the lower court. The record being in the same case need not be formally put in evidence. *Com. v. Lane*, 151 Mass. 356.

The fact that testimony within this article is admitted, does not exclude contradictory parol evidence. *Com. v. Waterman*, 122 Mass. 43.

As to entries in corporation books, see *Howard v. Hayward*, 10 Metc. 408.

ARTICLE 35.

RELEVANCY OF STATEMENTS IN WORKS OF HISTORY, MAPS, CHARTS, AND PLANS.

Statements as to matters of general public history made in accredited historical books are deemed to be relevant

when the occurrence of any such matter is in issue or is or is deemed to be relevant to the issue; but statements in

such works as to private rights or customs are deemed to be irrelevant.⁹⁷

[*Submitted*] Statements of facts in issue or relevant or deemed to be relevant to the issue made in published maps or charts generally offered for public sale as to matters of public notoriety, such as the relative position of towns and countries, and such as are usually represented or stated in such maps or charts, are themselves deemed to be relevant facts;⁹⁸ but such statements are irrelevant if they relate to matters of private concern, or matters not likely to be accurately stated in such documents.⁹⁹

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), secs. 139 and 497; 9 Am. & Eng. Encyclopædia of Law (2d ed.), p. 885 *et seq.*; Abbott's Trial Evidence (2d ed.), p. 883.

As to first paragraph of text, see *Woods v. Banks*, 14 N. H. 101.

Sustaining text so far as works by authors, long deceased, are concerned: *State v. Wagner*, 61 Me. 178.

An illustration in a medical book is not admissible. *Ordway v. Haynes*, 50 N. H. 159.

⁹⁷ See cases in 2 Ph. Ev. 155-6, and *Read v. Bishop of Lincoln*, [1892], A. C. 644, at pp. 652-654.

⁹⁸ In *R. v. Orton*, maps of Australia were given in evidence to show the situation of various places at which the defendant said he had lived. In *R. v. Jameson*, Trial at Bar, 21 July, 1896, standard maps of South Africa were admitted to show the general positions of the places referred to: Phipson, p. 354.

⁹⁹ *E. g.* a line in a tithe commutation map purporting to denote the boundaries of A's property is irrelevant in a question between A and B as to the position of the boundaries: *Wilberforce v. Hearfield*, 1877, 5 Ch. Div. 709, and see *Hammond v. Bradstreet*, 1854, 10 Ex. 390; and *R. v. Berger*, [1894], 1 Q. B. 823. See, too, Phipson, pp. 333, 334.

Maps.—Ancient maps, shown to be genuine, are competent evidence to prove matters relating to general or public rights. *Lawrence v. Tennant*, 64 N. H. 532.

Or private boundary. *Gibson v. Poor*, 21 N. H. 440.

Private surveys are not admissible without proof of their correctness. *Whitehouse v. Beckford*, 29 N. H. 471.

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An almanac is admissible. *State v. Morris*, 47 Conn. 179.

A printed book, purporting to be a copy of the statutes of another State, is not evidence of such statutes. *Bostwick v. Bogardus*, 2 Root, 250. But, now, see Connecticut Gen. Stat., sec. 1087.

The reading to the court or jury of books recognized by experts as authority, may be allowed or refused in the exercise of judicial discretion. *Richmond's Appeal*, 59 Conn. 244.

Standard medical works on insanity may be read to the jury by the counsel for the accused, upon the question of his insanity. A long practice has established this rule in this State. *State v. Hoyt*, 46 Conn. 337.

This rule must be regarded as confined exclusively to cases where the plea of insanity is interposed. *Richmond's Appeal*, 59 Conn. 244.

In examining a medical expert, counsel may read questions from a medical book for the purpose of making himself understood. *Tompkins v. West*, 56 Conn. 485.

Law books.—A reported case may be read to the jury in a criminal case. *State v. Hoyt*, 46 Conn. 330.

Maps, plans and photographs.—The plaintiffs agreed to furnish an "illustrated history of the city of New Haven," which should contain a map of the city. In a suit for the price it was held, that the defendant had a right to introduce a published map of recognized accuracy for the purpose of comparing the map with it, and showing that it was not substantially accurate. *Munsell v. Baldwin*, 56 Conn. 525.

A map or diagram on a deed properly in evidence, in such relation to the words of the deed as to indicate that the grantor intended it to be a part of the description, is itself admissible and a part of the deed although not referred to in the deed. *Murray v. Klinzing*, 64 Conn. 85, 86.

In a criminal prosecution, a plan of the house where the crime was said to have been committed, made without any personal ex-

amination of the premises by the draftsman, but sworn to be correct by one who resided there, was introduced by the State to explain their oral testimony, but did not go into the jury-room. Held, that there was nothing improper in this. *State v. Jerome*, 33 Conn. 268.

A survey found among the papers of a deceased surveyor, but where there was no evidence that it was made from actual survey, or at whose procurement, held not admissible in evidence. *Free v. James*, 27 Conn. 79.

A map or survey of a parcel of land, found among the papers of a former owner of such land, after his death, and which he had exhibited during his lifetime as a representation of the premises, is admissible as evidence of the boundaries of such parcel against those claiming under him. *Nichols v. Turney*, 15 Conn. 111.

A copy of a certificate of survey, signed by one person as surveyor, and by two others as committee, and one other as register, is not admissible in an action of ejectment between private individuals. *Wells v. Tryon*, 3 Day, 490.

In connection with the opening of a way by the owner of the land, evidence that he opened it according to a certain map, made for the purpose, and of such map, is admissible to show a dedication. *Hamlin v. Norwich*, 40 Conn. 24. See *Derby v. Alling*, 40 Conn. 435.

An ancient layout of a highway by a proprietors' committee, with evidence that it was recorded in the proprietors' book, and that the land thus laid out has ever since been used as a highway, is admissible to prove the existence, by dedication, of the highway, and its width. *State v. Meritt*, 35 Conn. 315.

A town survey and layout of a highway is inadmissible to prove its existence, if it describes its courses and distances longitudinally only, without in any way defining its breadth. *Beardslee v. French*, 7 Conn. 127.

To prove the existence and extent of a highway, as against an adjoining proprietor, an ancient map, representing a number of lots and highways, embracing the *locus in quo*, as surveyed and laid out by the committee of the proprietors of undivided lands, seventy-five years before, was introduced, with proof that it was found among the papers and records of said proprietors. Held, admissible as evidence in the nature of general reputation. *Noyes v. Ward*, 19 Conn. 257, 267.

The admissibility of a photograph does not depend upon its verification by the photographer, provided it is shown to be accu-

rate by any one competent to speak from personal observation. The sufficiency of the verification is a preliminary question of fact for the judge. *McGar v. Borough of Bristol*, 71 Conn. 652.

It is error to admit a photograph without verification. *Cunningham v. F. H. & W. R. R. Co.*, 72 Conn. 244.

Photographic views of the scene of an accident are admissible as a representation of the place. Any difference that arises from the views being taken at a different season of the year can be explained. *Dyson v. N. Y. & N. E. R. R. Co.*, 57 Conn. 24.

A document purporting to be "land plans," of the railroad company whose track crossed the *locus in quo*, was admitted in evidence without proof of its authenticity other than the fact of its production from proper custody where it had been kept for more than thirty years, the court holding it to be admissible for certain purposes, but not admissible, in view of the evidence as to its accuracy, "as a map of the land in controversy." Held, that the error in this ruling, if any, was not, upon a trial to the court and in view of the facts found, material. *New Haven v. N. Y., N. H. & H. R. R. Co.*, 72 Conn. 225.

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An encyclopædia is not admissible to prove recent occurrences. *Whiton v. Albany, etc., Ins. Co.*, 109 Mass. 24.

A list of prices current may be admitted if proved to be reliable. *Whitney v. Thacher*, 117 Mass. 523.

Scientific books.—Scientific books are not admissible, nor may they be read in argument. *Com. v. Wilson*, 1 Gray, 337; *Washburn v. Cuddihy*, 8 Gray, 430; *Ashworth v. Kittridge*, 12 Cush. 193, 59 Am. Dec. 178; *Com. v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401; *Com. v. Brown*, 121 Mass. 69.

Medical books.—Medical books are not competent evidence. *Ashworth v. Kittridge*, 12 Cush. 193, 59 Am. Dec. 178; *Com. v. Sturtivant*, 117 Mass. 122; *Com. v. Wilson*, 1 Gray, 337.

Nor may they be read to the jury. *Washburn v. Cuddihy*, 8 Gray, 430.

Law books.—The court, in its discretion, may allow books of statutes to be read to the jury. *Com. v. Hill*, 145 Mass. 305. See also *Com. v. Porter*, 10 Metc. 263.

Unofficial compilation of the laws of another State is not generally admissible. *Bride v. Clark*, 161 Mass. 130.

Maps, etc.—*Com. v. King*, 150 Mass. 221.

Ancient maps, shown to be genuine, are competent evidence to establish private boundary. *Whitman v. Shaw*, 166 Mass. 451.

A plan or picture is admissible if verified by proof. *Blair v. Pelham*, 118 Mass. 420; *Marcy v. Barnes*, 16 Gray, 161; *Hollenbeck v. Rowley*, 8 Allen, 473. *Contra*, *Bearce v. Jackson*, 4 Mass. 408.

A map published by authority of the legislature is admissible to prove town boundaries. *Com. v. King*, 150 Mass. 221.

The judge is to pass upon the sufficiency of the verification. *Blair v. Pelham*, 118 Mass. 420; *Walker v. Curtis*, 116 Mass. 98. See also *Com. v. Coe*, 115 Mass. 481.

ARTICLE 36.

ENTRIES IN BANKERS' BOOKS.

A copy of any entry in a banker's book must in all legal proceedings be received as *primâ facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded [even in favour of a party to a cause producing a copy of an entry in the book of his own bank].¹

Such copies may be given in evidence only on the condition stated in Article 71 (*f*).

The expression "Bankers' books" includes ledgers, day-books, cash-books, account-books, and all other books used in the ordinary business of the bank.²

The word "Bank" is restricted to banks which have duly made a return to the Commissioners of Inland Revenue,

Savings banks certified under the Act relating to savings banks,

Post-office savings banks, and

any company carrying on the business of bankers to

¹ *Harding v. Williams*, 1880, 14 Ch. Div. 197.

² And applies apparently to the books of bankers in all parts of the United Kingdom: *Kissam v. Link*, *post*.

which the Companies Acts, 1862 to 1880, are applicable, which has furnished to the registrar of joint-stock companies a list and summary, as required by the second part of the Companies Act, 1862, with the addition of a statement of the names of the several places where it carries on business.³

The fact that any bank has duly made a return to the Commissioners of Inland Revenue may be proved in any legal proceeding by the production of a copy of its return verified by the affidavit of a partner or officer of the bank, or by the production of a copy of a newspaper purporting to contain a copy of such return published by the Commissioners of Inland Revenue.

The fact that a company carrying on the business of bankers has duly furnished a list and summary [*semble* with the addition specified] may be proved by the certificate of the registrar or any assistant registrar.⁴

The fact that any such savings bank is certified under the Act relating to savings banks may be proved by an office or examined copy of its certificate. The fact that any such bank is a post-office savings bank may be proved by a certificate purporting to be under the hand of Her Majesty's Postmaster-General or one of the secretaries of the Post Office.⁵

³ 45 & 46 Vict. c. 72, s. 11.

⁴ 45 & 46 Vict. c. 72, s. 11.

⁵ 42 & 43 Vict. c. 11.

ARTICLE 37.

BANKERS NOT COMPELLABLE TO PRODUCE THEIR BOOKS.

A bank or officer of a bank is not in any legal proceeding to which the bank is not a party compellable to produce any banker's book, or to appear as a witness to prove the matters, transactions, and accounts therein recorded unless by order of a Judge of the High Court made for special cause [or by a County Court Judge in respect of actions in his own court].⁶

ARTICLE 38.

JUDGE'S POWERS AS TO BANKER'S BOOKS.

On the application of any party to a legal proceeding a Court or Judge [including a County Court Judge acting in respect to an action in his own court] may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. Such order may be made either with or without summoning the bank, or any other party, and must be served on the bank three clear days [exclusive of Sundays and Bank holidays] before it is to be obeyed, unless the Court otherwise directs.⁷

⁶ 42 & 43 Vict. c. 11, ss. 7, 10.

⁷ 42 & 43 Vict. c. 11, s. 7. See *Davies v. White*, 1884, 53 L. J., Q. B. 275; *In re Marshfield*, *Marshfield v. Hutchings*, 1886, 32 Ch. D. 499; *Arnott v. Hayes*, 1887, 36 Ch. D. 731. The order may be made in respect of books in any part of the United Kingdom; *Kissam v. Link*, [1896], 1 Q. B. 574. See *post*, Article 71 (b).

ARTICLE 39.*

“ JUDGMENT.”

The word “ judgment ” in Articles 40-47 means any final judgment, order or decree of any Court.

The provisions of Articles 40-45 inclusive, are all subject to the provisions of Article 46.

ARTICLE 40.

ALL JUDGMENTS CONCLUSIVE PROOF OF THEIR LEGAL EFFECT.

All judgments whatever are conclusive proof as against all persons of the existence of that state of things which they actually effect when the existence of the state of things so effected is a fact in issue or is or is deemed to be relevant to the issue. The existence of the judgment effecting it may be proved in the manner prescribed in Part II.

Illustrations.

(a) The question is, whether A has been damaged by the negligence of his servant B in injuring C's horse.

A judgment in an action, in which C recovered damages against A, is conclusive proof as against B, that C did recover damages against A in that action.⁸

(b) The question is, whether A, a shipowner, is entitled to recover as for a loss by capture against B, an underwriter.

* See Note XXIII.

⁸ *Green v. New River Company*, 1792, 4 T. R. 589. (See Article 44, Illustration (a).)

A judgment of a competent French prize court condemning the ship and cargo as prize, is conclusive proof that the ship and cargo were lost to A by capture.⁹

(c) The question is, whether A can recover damages from B for a malicious prosecution.

The judgment of a Court by which A was acquitted is conclusive proof that A was acquitted by that Court.¹⁰

(d) A, as executor to B, sues C for a debt due from C to B.

The grant of probate to A is conclusive proof as against C, that A is B's executor.¹¹

(e) A is deprived of his living by the sentence of an ecclesiastical court.

The sentence is conclusive proof of the act of deprivation in all cases.¹²

(f) A and B are divorced *a vinculo matrimonii* by a sentence of the Divorce Court.

The sentence is conclusive proof of the divorce in all cases.¹³

AMERICAN NOTE.

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Authorities.—1 Greenleaf on Evidence (15th ed.), secs. 527, 538, 539; Underhill on Evidence, sec. 157; *Spencer v. Dearth*, 43 Vt. 98, 105; *Harrington v. Wadsworth*, 63 N. H. 400; *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675; *Chamberlain v. Carlisle*, 26 N. H. 540.

The grant of probate is conclusive proof of executorship as to all persons. *Steen v. Bennett*, 24 Vt. 303.

A decree appointing a guardian is conclusive proof of the existence of the guardianship. *Farrar v. Olmstead*, 24 Vt. 123.

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The record of judgment is not admissible for any purpose against a person not a party or privy to it, except to prove the fact that

⁹ Involved in *Geyer v. Aguilar*, 1798, 7 T. R. 681.

¹⁰ *Leggatt v. Tollervey*, 1811, 14 East, 302; and see *Caddy v. Barlow*, 1827, 1 Man. & Ry. 277.

¹¹ *Allen v. Dundas*, 1789, 37 R. 125. In this case the will to which probate had been obtained was forged.

¹² Judgment of Lord Holt in *Philips v. Bury*, 1788, 2 T. R. 346, 351.

¹³ Assumed in *Needham v. Bremner*, 1866, L. R. 1 C. P. 583.

such a judgment was rendered. *Smith v. Chapin*, 31 Conn. 532; *Trubee v. Wheeler*, 53 Conn. 461. See also *Cowles v. Harts*, 3 Conn. 552; *Union Mfg. Co. v. Pitkin*, 14 Conn. 183.

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Authorities.—Sustaining text: *Burlen v. Shannon*, 3 Gray, 387, 389; *Day v. Floyd*, 130 Mass. 488; *Emery v. Hildreth*, 2 Gray, 228.

A decree appointing a trustee is conclusive proof of the existence of the trust relation. *Bassett v. Crafts*, 129 Mass. 513.

A valid decree of divorce is conclusive upon the world. *Adams v. Adams*, 154 Mass. 290.

A decree granting administration upon the estate of a living person is void for want of jurisdiction. *Jochumsen v. Suffolk Sav. Bank*, 3 Allen, 89.

ARTICLE 41.

JUDGMENTS CONCLUSIVE AS BETWEEN PARTIES AND PRIVIES OF FACTS FORMING GROUND OF JUDGMENT.

Every judgment is conclusive proof as against parties and privies of facts directly in issue in the case, actually decided by the Court, and appearing from the judgment itself to be the ground on which it was based; unless evidence was admitted in the action in which the judgment was delivered which is excluded in the action in which that judgment is intended to be proved.¹⁴

Illustrations.

(a) The question is, whether C, a pauper, is settled in parish A or parish B.

D is the mother and E the father of C. D, E, and several of their children were removed from A to B before the question as to C's settlement arose, by an order unappealed against, which order described D as the wife of E.

¹⁴ *R. v. Hutchins*, 1880, 5 Q. B. D. 353, supplies a good illustration of this principle.

The statement in the order that D was the wife of E is conclusive as between A and B.¹⁵

(b) A and B each claim administration to the goods of C, deceased.

Administration is granted to B, the judgment declaring that, as far as appears by the evidence, B has proved himself next of kin.

Afterwards there is a suit between A and B for the distribution of the effects of C. The declaration in the first suit is in the second suit conclusive proof as against A that B is nearer of kin to C than A.¹⁶

(c) A company sues A for unpaid premium and calls. A special case being stated in the Court of Common Pleas, A obtains judgment on the ground that he never was a shareholder.

The company being wound up in the Court of Chancery, A applies for the repayment of the sum he had paid for premium and calls. The decision that he never was a shareholder is conclusive as between him and the company that he never was a shareholder, and he is therefore entitled to recover the sums he paid.¹⁷

(d) A obtains a decree of judicial separation from her husband B, on the ground of cruelty and desertion, proved by her own evidence.

Afterwards B sues A for dissolution of marriage on the ground of adultery, in which suit neither B nor A can give evidence. A charges B with cruelty and desertion. The decree in the first suit is deemed to be irrelevant in the second.¹⁸

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Authorities.—1 Greenleaf on Evidence (15th ed.), sec. 524 *et seq.*; Thayer's Preliminary Treatise on Evidence, p. 398 *et seq.*; *Sanderson v. Peabody*, 58 N. H. 116; *Quinn v. Quinn*, 16 Vt. 426; *Woodruff v. Woodruff*, 11 Me. 475; *Bradley v. Bradley*, 11 Me. 367; *Kendall v. School District*, 75 Me. 358.

¹⁵ *R. v. Hartington Middle Quarter*, 1855, 4 E. & B. 780; and see *Flitters v. Alfrey*, 1874, L. R. 10 C. P. 29; and contrast *Dover v. Child*, 1876; 1 Ex. Div. 172.

¹⁶ *Barrs v. Jackson*, 1845, 1 Phill. 582, 587, 588.

¹⁷ *Bank of Hindustan, &c., Alison's Case*, 1873, L. R. 9 Ch. App. 24.

¹⁸ *Stoate v. Stoate*, 1861, 2 Swa. & Tri. 223. Both would now be competent witnesses in each suit.

A judgment is conclusive as to facts within the issues and actually litigated. Parol evidence is admissible to prove what was litigated. *Emlden v. Lisherness*, 89 Me. 578.

If the second suit is upon a different cause of action the judgment is conclusive only as to matters actually litigated, not as to those which might have been litigated. *Metcalf v. Gilmore*, 63 N. H. 174, 181.

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Authorities.—*Fenwick Hall Co. v. Old Saybrook*, 69 Conn. 40; *Bethlehem v. Watertown*, 47 Conn. 237; *Burnet v. Belfry*, 47 Conn. 323.

In a subsequent suit on the same cause of action, a judgment is conclusive as to all matters within the issues which might have been litigated, whether they actually were or not. *Huntley v. Holt*, 59 Conn. 102.

To make a former judgment or decree operate as an estoppel as to any fact found, or, in general, to make it evidence at all, the finding of such fact must have been necessary to uphold the judgment or decree; and to create an estoppel, such fact or point must have been directly put in issue, and it must so appear on the record. *Fairman v. Bacon*, 8 Conn. 425; *Cowles v. Harts*, 3 Conn. 522; *Smith v. Sherwood*, 4 Conn. 282; *Abbe v. Goodwin*, 7 Conn. 303; *Crandall v. Gallup*, 12 Conn. 373; *Dickinson v. Hayes*, 31 Conn. 423; *Kennedy v. Scovil*, 14 Conn. 69; *Thompson v. N. T. Bushnell Co.*, 80 Fed. Rep. 332.

The record of a judgment in a summary process for the recovery of leased premises by A against B, is conclusive evidence against B and his grantees that he was in possession at the time as the tenant of A. *Richmond v. Stahle*, 48 Conn. 23.

A decree in equity finding an immaterial fact is not admissible, in a subsequent suit between the same parties, to prove such fact. *Hotchkiss v. Nichols*, 3 Day, 143.

A judgment at law or decree in equity of a court having jurisdiction is conclusive between the parties to it and their privies, upon every material fact in issue, and cannot be collaterally impeached. *Peck v. Woodbridge*, 3 Day, 36; *Canaan v. Greenwoods Turnpike Co.*, 1 Conn. 6; *Willey v. Paulk*, 6 Conn. 75; *Griswold v. Bigelow*, 6 Conn. 264; *Sears v. Terry*, 26 Conn. 280, 282; *McLoud v. Selby*, 10 Conn. 396; *Holcomb v. Phelps*, 16 Conn. 131; *Ormsbee v. Davis*, 16 Conn. 576.

The effect of an estoppel by judgment is not limited by the pre-

cise facts that may have been found to support it. The adjudication covers the real transaction which was the subject of litigation. *Freeman's Appeal*, 71 Conn. 708.

The only matter essential to making a former judgment conclusive between the parties is, that the question to be determined in the second action is the same question judicially settled in the first. A judgment is conclusive not only as to the subject-matter in the suit, but as to all other suits which, though concerning other subject-matters, involve the same question of controversy. *Huntley v. Holt*, 59 Conn. 107.

A judgment is conclusive, or of no effect; and it is not admissible as evidence of the matters on which it is based, except where conclusive. *Bethlehem v. Watertown*, 51 Conn. 494.

The rule of *res judicata* does not rest wholly on the narrow ground of a technical estoppel, nor upon the presumption that the former judgment was right and just; but on the broad ground of public policy that requires a limit to litigation. *Sargent & Co. v. New Haven Steamboat Co.*, 65 Conn. 116.

The term *res judicata* is used in two senses, namely, with respect to the cause of action already determined by judgment; and, second, with reference to the conclusiveness of the fact involved in another cause of action and contested and determined in a judgment upon that cause of action. *Fuller v. Metropolitan Life Ins. Co.*, 68 Conn. 55, 64.

The rule of *res judicata* does not render a fact involved in a decision conclusive when the same plaintiff brings suit against the same defendant upon a cause of action assigned since the rendition of the former judgment, and this is not affected by section 981 of the General Statutes, permitting assignees to sue in their own name. *Fuller v. Metropolitan Life Ins. Co.*, 68 Conn. 55, 66.

The identity of parties necessary to support an estoppel by judgment does not exist if the suitors do not occupy the same individual or representative capacity in each suit. *Clarke's Appeal*, 70 Conn. 195; *Fuller v. Metropolitan Life Ins. Co.*, 68 Conn. 55.

MASSACHUSETTS.

Authorities.—*Burlen v. Shannon*, 3 Gray, 387; *McCaffrey v. Carter*, 125 Mass. 330; *White v. Weatherbee*, 126 Mass. 450; *Bliss v. N. Y. Cent. R. R. Co.*, 160 Mass. 447, 455; *Fuller v. Shattuck*, 13 Gray, 70; *Miller v. Miller*, 150 Mass. 111; *Bradley v. Brigham*, 149 Mass. 141; *Bigelow v. Winsor*, 1 Gray, 299.

A judgment is conclusive as to facts within the issues and actually litigated. Parol evidence is admissible to prove what was litigated. *Stone v. St. Louis Stamping Co.*, 155 Mass. 267.

In a subsequent suit on the same cause of action, a judgment is conclusive as to all matters within the issues, which might have been litigated, whether they actually were or not. *Bassett v. Conn. Riv. R. R. Co.*, 150 Mass. 179; *Foye v. Patch*, 132 Mass. 110; *Bennett v. Hood*, 1 Allen, 47; *Horner v. Fish*, 1 Pick. 435.

If the second suit is upon a different cause of action, the judgment is conclusive only as to matters actually litigated, not as to those which might have been litigated. *Foye v. Patch*, 132 Mass. 106; *Gilbert v. Thompson*, 9 Cush. 348; *Morse v. Elms*, 131 Mass. 151; *Evans v. Clapp*, 123 Mass. 165; *Newell v. Carpenter*, 118 Mass. 411; *Sibley v. Hulbert*, 15 Gray, 509; *Norton v. Huxley*, 13 Gray, 285; *Gage v. Holmes*, 12 Gray, 428; *Burnett v. Smith*, 4 Gray, 50; *Norton v. Doherty*, 3 Gray, 372.

ARTICLE 42.

STATEMENTS IN JUDGMENTS IRRELEVANT AS BETWEEN STRANGERS, EXCEPT IN ADMIRALTY CASES.

Statements contained in judgments as to the facts upon which the judgment is based are deemed to be irrelevant as between strangers, or as between a party, or privy, and a stranger, except¹⁹ in the case of judgments of Courts of Admiralty condemning ship as a prize. In such cases the judgment is conclusive proof as against all persons of the fact on which the condemnation proceeded, where such fact is plainly stated upon the face of the sentence.

Illustrations.

(a) The question between A and B is, whether certain lands in Kent had been disgavelled. A special verdict on a feigned issue between

¹⁹ This exception is treated by Lord Eldon as an objectionable anomaly in *Lothian v. Henderson*, 1803, 3 Bos. & Pul. at p. 545. See, too, *Castrique v. Imrie*, 1870, L. R. 4 E. & I. App. 434-5.

C and D (strangers to A and B) finding that in the 2nd Edw. VI. a disgavelling Act was passed in words set out in the verdict is deemed to be irrelevant.²⁰

(b) The question is, whether A committed bigamy by marrying B during the lifetime of her former husband C.

A decree in a suit of jactitation of marriage, forbidding C to claim to be the husband of A, on the ground that he was not her husband, is deemed to be irrelevant.²¹

(c) The question is, whether A, a shipowner, has broken a warranty to B, an underwriter, that the cargo of the ship whose freight was insured by A was neutral property.

The sentence of a French prize court condemning ship and cargo, on the ground that the cargo was enemy's property, is conclusive proof in favour of B that the cargo was enemy's property (though on the facts the Court thought it was not).²²

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), secs. 523, 525, 526, 535, 543, 544, 545, 556; Underhill on Evidence, sec. 150*b*; *Lord v. Chadbourne*, 42 Me. 429, 66 Am. Dec. 290; *Woodruff v. Taylor*, 20 Vt. 65.

CONNECTICUT.

Strangers.—*Ashmead v. Colby*, 26 Conn. 315; *Beers v. Broome*, 4 Conn. 256, 257; *Betts v. New Hartford*, 25 Conn. 185; *Stevens v. Curtiss*, 3 Conn. 265; *Fowler v. Savage*, 3 Conn. 96; *Hough v. Ives*, 1 Root, 492; *Edey v. Williams*, 1 Root, 186; *Southington Eccl. Soc. v. Gridley*, 20 Conn. 202; *Fowler v. Collins*, 2 Root, 231; *McLoud v. Selby*, 10 Conn. 396.

Criminal sentences are not evidence in civil issues, the parties being different, and the objects and results of the two proceedings equally diverse. *Betts v. New Hartford*, 25 Conn. 180; *State v. Bradnack*, 69 Conn. 215.

The converse of this rule, namely, that a judgment in a civil action is not admissible in a subsequent criminal prosecution, is equally true. *State v. Bradnack*, 69 Conn. 215.

In suing for treble damages for a theft, the plaintiff can make no

²⁰ *Doe v. Brydges*, 1843, 6 M. & G. 282.

²¹ *Duchess of Kingston's Case*, 1776, 2 S. L. C. 713.

²² *Geyer v. Aguilar*, 1798, 7 T. R. 681.

use of the record of the defendant's conviction for the crime, since he is a stranger to it. *Salisbury v. State*, 6 Conn. 104.

In an action by an officer against a receiptsman of goods taken on execution, for a failure to redeliver, the defense was that a prior execution had been issued and fully satisfied before that committed to the plaintiff. Held, that it was no answer to this, that, on an *audita querela*, brought by the debtor against the plaintiff, averring payment of the prior execution, the plaintiff had been found not guilty; since the defendant was a stranger to that judgment, and it was, therefore, not even admissible in evidence. *Stevens v. Curtiss*, 3 Conn. 265.

A decree of foreclosure against a mortgagor can be no evidence, in an action at law between other parties, of a breach of covenant; nor can it affect the liability of any person, not a party to the bill, for rents and profits, depending upon a question of legal title. *Beers v. Broome*, 4 Conn. 256, 257.

An action for conversion was brought four months after the conversion and the property attached. A statutory bond was substituted, by which the obligors bound themselves that, if the defendant did not pay the judgment, the obligors would pay the value of property. Afterwards a part of the property was returned. In the suit the facts were found by a committee, who reported the value, and the damage done to the property returned, and judgment was rendered for those sums. In a suit on the bond, to recover the value of the property not returned, it was held, that the report of the committee was not admissible against the obligors, except for the purpose of showing the fact of the judgment, the defendants not being parties to that suit. *Trubee v. Wheeler*, 53 Conn. 461.

In a suit against a city for not providing sufficient culverts under streets that crossed a brook, which had been taken for a sewer and into which sewers were discharged, it was held, that a judgment obtained by another owner on the same stream for an injury to his property about the same time and from the same cause and involving the same question was not admissible. *Burdick v. Norwich*, 49 Conn. 228.

The general rule that judgments shall bind only parties and privies admits of this exception, that one may agree to stand in the place of another and to be so fully answerable for his debt or unlawful act as that a judgment against the latter shall conclude the former as to the amount of such debt or damage. *Levick v. Norton*, 51 Conn. 470.

Admiralty.—Whenever a Court of Admiralty in one country, acting as a prize court, decides on the question of prize, and condemns captured property, such sentence or decree is conclusive evidence of the character of the property, when brought in question in any other country recognizing the law of nations. *Brown v. Union Ins. Co.*, 4 Day, 187.

In an action on a policy of insurance, the sentence of a foreign Court of Admiralty, condemning the property insured as enemies' property, is conclusive evidence to falsify a warranty of neutrality. *Brown v. Union Ins. Co.*, 4 Day, 188, 189.

The decree of a foreign Court of Admiralty, condemning a ship as prize, cannot be called in question here and impeached collaterally for fraud in procuring it. *Stewart v. Warner*, 1 Day, 148.

A ship was attached in Louisiana as the estate of A, in a suit against him, and sold under an order of court pending the suit. Afterwards B, the real owner, though he had not been cited in, filed a claim that the order of sale might be annulled and the ship restored to him; but, by the final decree, the proceeds of the sale were applied to the debt of A. Held, that the record of these proceedings was of no effect in a subsequent action of trespass brought by B against the Louisiana plaintiff for the taking; it being *res inter alios acta*; and the tort, in any aspect of the case, being completed before B's appearance and claim. *Denison v. Hyde*, 6 Conn. 518, 519.

Judgments *in rem* bind everybody with any interest in the subject-matter. Such is a judgment establishing a will. *State v. Blake*, 69 Conn. 78.

MASSACHUSETTS.

Strangers.—*Brigham v. Fayerweather*, 140 Mass. 414 (quoting this article); *Wing v. Bishop*, 3 Allen, 456; *Wood v. Mann*, 125 Mass. 319; *Eastman v. Symonds*, 108 Mass. 567; *Nettleton v. Beach*, 107 Mass. 499; *Finn v. Western Railroad*, 102 Mass. 283; *Leonard v. Bryant*, 11 Metc. 370; *Shrewsbury v. Boylston*, 1 Pick. 105; *Tyler v. Ulmer*, 12 Mass. 163; *Perkins v. Pitts*, 11 Mass. 125.

Admiralty.—Sustaining text: *Baxter v. New Eng. Ins. Co.*, 6 Mass. 277.

Judgments in rem.—Judgments *in rem* are conclusive as to everybody. *Shores v. Hooper*, 153 Mass. 228; *Brigham v. Fayerweather*, 140 Mass. 411, 413.

A judgment *in rem* is deemed irrelevant to establish any fact not appearing from the proceedings to have been directly in issue be-

fore and decided by the court even though the fact must have been assumed in arriving at the judgment. *Lea v. Lea*, 99 Mass. 493, 96 Am. Dec. 772, and note.

ARTICLE 43.

EFFECT OF JUDGMENT NOT PLEADED AS AN ESTOPPEL.

If a judgment is not pleaded by way of estoppel it is as between parties and privies deemed to be a relevant fact, whenever any matter, which was, or might have been decided in the action in which it was given, is in issue, or is or is deemed to be relevant to the issue, in any subsequent proceeding.

Such a judgment is conclusive proof of the facts which it decides, or might have decided, if the party who gives evidence of it had no opportunity of pleading it as an estoppel.

Illustrations.

(a) A sues B for deepening the channel of a stream, whereby the flow of water to A's mill was diminished.

A verdict recovered by B in a previous action for substantially the same cause, and which might have been pleaded as an estoppel, is deemed to be relevant, but not conclusive in B's favour.²³

(b) A sues B for breaking and entering A's land; and building thereon a wall and a cornice. B pleads that the land was his, and obtains a verdict in his favour on that plea.

Afterwards B's devisee sues A's wife (who on the trial admitted that she claimed through A) for pulling down the wall and cornice. As the first judgment could not be pleaded as an estoppel (the wife's right not appearing on the pleadings), it is conclusive in B's favour that the land was his.²⁴

²³ *Vooght v. Winch*, 1819, 2 B. & Ald. 662; and see *Feversham v. Emerson*, 1855, 11 Ex. 391.

²⁴ *Whitaker v. Jackson*, 1864, 2 H. & C. at p. 926. This had previously been doubted. See 2 Ph. Ev. 24, n. 4.

AMERICAN NOTE.

GENERAL.

Authorities.—9 Encyclopædia of Pleading and Practice, pp. 613, 618; 1 Greenleaf on Evidence (15th ed.), sec. 531, and notes; *Perkins v. Walker*, 19 Vt. 144; *Gray v. Pingry*, 17 Vt. 424.

It is generally held in this country that the judgment is conclusive, whether pleaded or not, and whether or not there was an opportunity to plead it. 1 Greenleaf on Evidence (15th ed.), sec. 531, and notes; *Gray v. Pingry*, 17 Vt. 419; *Whitney v. Clarendon*, 18 Vt. 252; *Mussey v. White*, 58 Vt. 45; *Perkins v. Walker*, 19 Vt. 114; *Chamberlain v. Carball*, 26 N. H. 540; *Gove v. Lyford*, 44 N. H. 528; *Blain v. Blain*, 45 Vt. 538; *Whiting v. Berger*, 78 Me. 287; *Walker v. Chase*, 53 Me. 258. Even if a foreign judgment. *Whiting v. Berger*, 78 Me. 287.

No opportunity to plead.—*King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675; *Chase v. Walker*, 26 Me. 555; *Isaacs v. Clark*, 12 Vt. 692; *Perkins v. Walker*, 19 Vt. 144; *Dame v. Wingate*, 12 N. H. 291; *Morgan v. Burr*, 58 N. H. 470.

CONNECTICUT.

A judgment is admissible and conclusive, however introduced in evidence. It need not be pleaded. *Betts v. Starr*, 5 Conn. 550, 553. Compare, *contra*, *Church v. Leavenworth*, 4 Day, 274.

A judgment proved under the general issue is as conclusive as though pleaded. *Bell v. Raymond*, 18 Conn. 98, 99.

No opportunity to plead.—*Shelton v. Alcox*, 11 Conn. 240; *Bell v. Raymond*, 18 Conn. 97.

MASSACHUSETTS.

A judgment is conclusive even if not pleaded when there was opportunity to plead it. *Foye v. Patch*, 132 Mass. 105; *Sprague v. Waite*, 19 Pick. 455.

No opportunity to plead.—*Howard v. Mitchell*, 14 Mass. 242; *Adams v. Barnes*, 17 Mass. 365; *Sprague v. Waite*, 19 Pick. 455.

ARTICLE 44.

JUDGMENTS GENERALLY DEEMED TO BE IRRELEVANT AS
BETWEEN STRANGERS.

Judgments are not deemed to be relevant as rendering probable facts which may be inferred from their existence, but which they neither state nor decide—

as between strangers;

as between parties and privies in suits where the issue is different even though they relate to the same occurrence or subject-matter;

or in favour of strangers against parties or privies.

But a judgment is deemed to be relevant as between strangers:

(1) if it is an admission, or

(2) if it relates to a matter of public or general interest, so as to be a statement under Article 30.

Illustrations.

(a) The question is, whether A has sustained loss by the negligence of B, his servant, who has injured C's horse.

A judgment recovered by C against A for the injury, though conclusive as against B, as to the fact that C recovered a sum of money from A, is deemed to be irrelevant to the question, whether this was caused by B's negligence.²⁵

(b) The question whether a bill of exchange is forged arises in an action on the bill. The fact that A was convicted of forging the bill is deemed to be irrelevant.²⁶

²⁵ *Green v. New River Company*, 1792, 4 T. R. 589. (See Article 40, Illustration (a).)

²⁶ Per Blackburn, J., in *Castrique v. Imrie*, 1870, L. R. 4 E. & I. App. at p. 434.

(c) A collision takes place between two ships A and B, each of which is damaged by the other.

The owner of A sues the owner of B, and recovers damages on the ground that the collision was the fault of B's captain. This judgment is not conclusive in an action by the owner of B against the owner of A, for the damage done to B.²⁷ [*Semble*, it is deemed to be irrelevant.]²⁸

(d) A is prosecuted and convicted as a principal felon.

B is afterwards prosecuted as an accessory to the felony committed by A.

The judgment against A is deemed to be irrelevant as against B, though A's guilt must be proved as against B.²⁹

(e) A sues B, a carrier, for goods delivered by A to B.

A judgment recovered by B against a person to whom he had delivered the goods, is deemed to be relevant as an admission by B that he had them.³⁰

(f) A sues B for trespass on land.

A judgment, convicting A for a nuisance by obstructing a highway on the place said to have been trespassed on is [at least] deemed to be relevant to the question, whether the place was a public highway [and is possibly conclusive].³¹

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), sec. 522 *et seq.*; Underhill on Evidence, sec. 150b.

Sustaining text: *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675.

Strangers.—*Grand Trunk R. R. Co. v. Latham*, 63 Me. 177.

It has been sometimes held that sureties on official bonds are concluded by judgments against their principals. *Tute v. James*, 50 Vt. 124.

A judgment against one of several joint-feasors is a defense in a suit against the others only if satisfied. *Cleveland v. Bangor*, 87 Me. 259.

²⁷ *The Calypso*, 1856, 1 Swab. Ad. 28.

²⁸ On the general principle in *Duchess of Kingston's Case*, 1776, 2 Smith's L. C. 713.

²⁹ *Semble* from *R. v. Turner*, 1832, 1 Moo. C. C. 347.

³⁰ *Tilly v. Cowling*, 1701, Buller, N. P. 242, b.; 1 Ld. Raymd. 744.

³¹ *Petrie v. Nuttall*, 1856, 11 Ex. 569.

A judgment against one of several persons, jointly and severally liable in contract, is a defense in a suit against the others only if satisfied. *Sawyer v. White*, 19 Vt. 40.

A judgment against a party in his personal capacity is not binding on him in a suit wherein he appears in a representative capacity. *Landers v. Arno*, 65 Me. 26.

Admissions.—*Parsons v. Copeland*, 33 Me. 370, 54 Am. Dec. 628; *Craig v. Carleton*, 8 Shepl. (Me.) 492.

CONNECTICUT.

Strangers.—*Burdick v. Norwich*, 49 Conn. 225.

One cannot avail himself of a judgment in his own favor in a suit which he brings as an assignee of a cause of action assigned to him after the rendition of the judgment. *Fuller v. Metropolitan Life Ins. Co.*, 68 Conn. 55.

A criminal judgment is not admissible in a civil suit unless it comes within the exception of the text. *State v. Bradnack*, 69 Conn. 212.

In suits on official bonds, judgments against the principals are admissible as against the surety. *New Haven v. Chidsey*, 68 Conn. 397.

MASSACHUSETTS.

Bartlett v. Boston Gas Co., 122 Mass. 209; *Burlen v. Shannon*, 99 Mass. 200, 96 Am. Dec. 733; *Burlen v. Shannon*, 14 Gray, 433.

Strangers.—A judgment against one of several joint tort-feasors is a defense in a suit against the others only if satisfied. *Savage v. Stevens*, 128 Mass. 254.

It has been sometimes held that sureties on official bonds are concluded by judgments against their principals. *Tracy v. Goodwin*, 5 Allen, 409.

A judgment against certain joint contracts constitutes a bar to a suit against the others if they were within the jurisdiction. *Kingsley v. Davis*, 104 Mass. 178.

A judgment against an indorser, unsatisfied, does not bar an action against the acceptor or maker. *Gilmore v. Carr*, 2 Mass. 171.

Issues different.—*Norton v. Huxley*, 13 Gray, 285; *Burlen v. Shannon*, 99 Mass. 200.

Admissions.—*Kellenberger v. Sturtevant*, 7 Cush. 465.

ARTICLE 45.

JUDGMENTS CONCLUSIVE IN FAVOUR OF JUDGE.

When any action is brought against any person for anything done by him in a judicial capacity, the judgment delivered, and the proceedings antecedent thereto, are conclusive proof of the facts therein stated, whether they are or are not necessary to give the defendant jurisdiction, if, assuming them to be true, they show that he had jurisdiction.

Illustration.

A sues B (a justice of the peace) for taking from him a vessel and 500 lbs. of gunpowder thereon. B produces a conviction before himself of A for having gunpowder in a boat on the Thames (against 2 Geo. III. c. 28).

The conviction is conclusive proof for B, that the thing called a boat was a boat.³²

AMERICAN NOTE.

GENERAL.

Authorities.—1 Wharton on Evidence, sec. 813.

MASSACHUSETTS.

Piper v. Pearson, 2 Gray, 120.

ARTICLE 46.

FRAUD, COLLUSION, OR WANT OF JURISDICTION MAY BE PROVED.

Whenever any judgment is offered as evidence under any of the articles hereinbefore contained, the party against

³² *Brittain v. Kinnaird*, 1819, 1 Brod. & Bing. 432.

whom it is so offered may prove that the Court which gave it had no jurisdiction, or that it has been reversed, or, if he is a stranger to it, that it was obtained by any fraud or collusion, to which neither he nor any person to whom he is privy was a party.³³

If an action is brought in an English Court to enforce the judgment of a foreign Court, and probably if an action is brought in an English Court to enforce the judgment of another English Court, any such matter as aforesaid may be proved by the defendant, even if the matter alleged as fraud was alleged by way of defence in the foreign Court and was not believed by them to exist.³⁴

AMERICAN NOTE.

GENERAL.

Authorities.—1 Wharton on Evidence, sec. 797; 17 Am. & Eng. Encyclopædia of Law (2d ed.), pp. 848, 1047 *et seq.*

Want of jurisdiction.—Any one may attack a judgment for want of jurisdiction. *Lovejoy v. Albee*, 33 Me. 414, 54 Am. Dec. 630; *Penobscot R. R. Co. v. Watson*, 52 Me. 456; *Buffum v. Ramsdell*, 55 Me. 252, 92 Am. Dec. 589; *Smith v. Knowlton*, 11 N. H. 19; *Kittredge v. Emerson*, 15 N. H. 227; *Wilbur v. Abbot*, 60 N. H. 40; *Eastman v. Dearborn*, 63 N. H. 364; *State v. Wakefield*, 60 Vt. 610; *Barrett v. Crane*, 16 Vt. 246; *Vaughn v. Congdon*, 56 Vt. 111, 48 Am. Rep. 758.

The recitals of the judgment of a Superior Court are conclusive upon the parties in considering jurisdictional questions. *Blaisdell v. Pray*, 68 Me. 269, 272.

A stranger can attack a judgment collaterally for want of jurisdiction. *Buffum v. Ramsdell*, 55 Me. 252.

A probate court is not a court of general jurisdiction. *Fowle v. Coe*, 63 Me. 248; *People's Savings Bank v. Wilcox*, 15 R. I. 258.

³³ Cases collected in 2 Taylor, ss. 1715, 1716, 1721. See, too, 2 Ph. Ev. 25, 70, and *Ochsenbein v. Papelier*, 1873, 8 Ch. App. 695.

³⁴ *Abouloff v. Oppenheimer*, 1882, 10 Q. B. D. 295.

Fraud.—A party cannot attack a judgment collaterally for fraud *aliunde* the record; a stranger can. *Davis v. Davis*, 61 Me. 395; *Granger v. Clark*, 22 Me. 128; *Smith v. Abbott*, 40 Me. 442; *Sidensparker v. Sidensparker*, 52 Me. 481, 83 Am. Dec. 527; *Blanchard v. Webster*, 62 N. H. 468; *Great Falls Mfg. Co. v. Worster*, 45 N. H. 110; *Atkinson v. Allen*, 12 Vt. 620, 36 Am. Dec. 361.

CONNECTICUT.

A judgment at law or decree in equity of a court having jurisdiction is conclusive between the parties to it and their privies, upon every material fact in issue, and cannot be collaterally impeached. *Wight v. Mott*, Kirb. 154; *Peck v. Woodbridge*, 3 Day, 36; *Canaan v. Greenwoods Turnpike Co.*, 1 Conn. 6; *Willey v. Paulk*, 6 Conn. 75; *Griswold v. Bigelow*, 6 Conn. 264; *Sears v. Terry*, 26 Conn. 280, 282; *McLoud v. Selby*, 10 Conn. 396; *Holcomb v. Phelps*, 16 Conn. 131; *Ormsbee v. Davis*, 6 Conn. 576; *Huntington v. Birch*, 12 Conn. 152.

Want of jurisdiction.—The recitals of the judgment of a court of general jurisdiction are conclusive upon the parties in considering jurisdictional questions. *Culver's Appeal*, 48 Conn. 165, 173; *Coit v. Haven*, 30 Conn. 190.

Any one may attack a judgment for want of jurisdiction. *Gruman v. Raymond*, 1 Conn. 40, 6 Am. Dec. 200; *Sears v. Terry*, 26 Conn. 280.

Such jurisdiction must embrace the parties, the subject-matter, and the process. *Sears v. Terry*, 26 Conn. 280.

The jurisdiction of courts of limited and inferior jurisdiction can be collaterally attacked, and if the want of jurisdiction in fact exists, the judgment is an absolute nullity. *Culver's Appeal*, 48 Conn. 173.

The jurisdiction of inferior courts is not presumed, but must be made to appear. *Coit v. Haven*, 30 Conn. 190.

A probate court is not a court of general jurisdiction. *Sears v. Terry*, 26 Conn. 273.

The judgment of a court of general jurisdiction may, in a proper case, be collaterally attacked for want of jurisdiction clearly shown by its own record. *Morey v. Hoyt*, 62 Conn. 554.

The record of a justice of the peace in a criminal cause stated that the defendant, who was recognized to appear at an adjourned court, being three times publicly called at said adjourned court, did not appear, but made default of appearance; whereupon the

recognizance was declared to be forfeited. Held, in an action on the recognizance, that the defendant could not prove by parol that he did in fact appear at the adjourned court, and left with the consent of the justice, as this would contradict the record. *Douglass v. Wickwire*, 19 Conn. 492.

Judicial records cannot be contradicted as to anything which the law requires to be recorded, and which is material. *Douglass v. Wickwire*, 19 Conn. 492.

The records of justices of the peace import absolute verity. *Douglass v. Wickwire*, 19 Conn. 492.

If the record of a court states that a bond was duly taken in court, parol evidence that it was in fact taken by the clerk, out of court, is inadmissible. *Rogers v. Moor*, 2 Root, 159.

MASSACHUSETTS.

A stranger may attack a judgment collaterally. Unless one has been served or made appearance he is a stranger. *Safford v. Weare*, 142 Mass. 231; *Needham v. Thayer*, 147 Mass. 536; *Eliot v. McCormick*, 144 Mass. 10; *Martin v. Kittredge*, 144 Mass. 13.

A party cannot attack a judgment collaterally for fraud; a stranger can. *Greene v. Greene*, 2 Gray, 361, 61 Am. Dec. 454; *Homer v. Fish*, 1 Pick. 435, 11 Am. Dec. 218; *M'Rae v. Mattoon*, 13 Pick. 57; *Downs v. Fuller*, 2 Metc. 135, 35 Am. Dec. 393; *Vose v. Morton*, 4 Cush. 27.

Want of jurisdiction.—A stranger can attack a judgment collaterally for want of jurisdiction. *Fall River v. Riley*, 140 Mass. 488. See also *Sumner v. Parker*, 7 Mass. 78.

A domestic judgment may be attacked collaterally for lack of jurisdiction. *Fall River v. Riley*, 140 Mass. 488.

In some States a justice court is a court of record. *Hendrick v. Whittemore*, 105 Mass. 23, 28.

The recitals of the judgment of a superior court are conclusive in considering jurisdictional questions so far as parties are concerned. *Finneran v. Leonard*, 7 Allen, 54.

ARTICLE 47.

FOREIGN JUDGMENTS.

The provisions of Articles 40-46 apply to such of the judgments of Courts of foreign countries as can by law be enforced in this country, and so far as they can be so enforced.³⁵

AMERICAN NOTE.

GENERAL.

Authorities.—2 Wharton on Evidence, sec. 802; 13 Am. & Eng. Encyclopædia of Law, p. 977 *et seq.*

Full faith and credit are to be given the judgments of sister States. U. S. Const., art. 4, sec. 1.

They are to have the same faith and credit as they would have in the State of their rendition. U. S. Rev. Stat., sec. 905.

The judgments of sister States may be attacked collaterally for want of jurisdiction whatever may be the jurisdictional averments of the record. *Gregory v. Gregory*, 78 Me. 187.

CONNECTICUT.

Fisher, Brown & Co. v. Fielding, 67 Conn. 91.

No greater effect is to be given to a judgment rendered in another country, or another State of the United States, in a suit upon it here, than it would have where rendered. *Wood v. Watkinson*, 17 Conn. 505, 508; *Stanton v. Embry*, 46 Conn. 65, 595.

The judgment of a State court, when proved in the manner provided by law, has the same effect in every other State as in the State where it was pronounced; and no pleas, which would not be

³⁵ The cases on this subject are collected in the note on the *Duchess of Kingston's Case*, 2 Smith's L. C. 765-800. A list of the cases will be found in Roscoe's N. P. 203-205. The last leading cases on the subject are *Goddard v. Gray*, L. R. 6 Q. B. 139, and *Castrique v. Imrie*, 1870, L. R. 4 H. L. 414. See, too, *Schisby v. Westenholz*, 1870, L. R. 6 Q. B. 155; *Rousillon v. Rousillon*, 1880, 14 Ch. Div. at p. 370; *Novion v. Freeman*, 1889, 15 App. Ca. 1; and *Sirdar Gurdyal Singh v. Faridkote*, [1894], A. C. 670.

good there, can be pleaded to an action on it in another State. *Warren Mfg. Co. v. Ætna Ins. Co.*, 2 Paine, 508; *Bank of North America v. Wheeler*, 28 Conn. 439.

But a plea showing that the court where it was rendered had no jurisdiction of the person is admissible. *Warren Mfg. Co. v. Ætna Ins. Co.*, 2 Paine, 510, 515.

Without personal service of process on the defendant while within the jurisdiction of the court, or his voluntary appearance, the court obtains no jurisdiction; and judgments rendered under such circumstances are not embraced within the meaning of article 4 of the United States Constitution. *Litchfield's Appeal*, 28 Conn. 135; *Aldrich v. Kinney*, 4 Conn. 387; *Wood v. Watkinson*, 17 Conn. 504.

Unless procured by fraud, a judgment for a pecuniary demand, rendered by a competent court of Great Britain against a Connecticut citizen who was personally served with process within its jurisdiction, is conclusive upon the merits of the cause of action, in a suit brought here for the collection of such judgment. The motive which prompts the exercise of the legal rights is of no importance. *Fisher, Brown & Co. v. Fielding*, 67 Conn. 91.

Effect will not be given in one State to judgments rendered in another, in pursuance of laws which are *contra bonos mores*, or opposed to the safety of the State, or to sound policy. *Denison v. Hyde*, 6 Conn. 519.

A law of another State authorizing a process by which the property of a man can be taken, without notice to him to defend against the proceeding, would be opposed to common right; and comity would not require that a judgment, based on and establishing such a taking, should be respected here. *Denison v. Hyde*, 6 Conn. 519.

A judgment of a court of one State of the United States can, in an action thereon in a court of another State, be inquired into only in respect to the jurisdiction of the former court over the person or subject-matter embraced in the judgment, and in respect to notice to the defendant; and such inquiry can be made, although the record of the judgment shows a service upon, or an appearance by, the defendant. *Downs v. Allen*, 23 Blatchf. 54.

A judgment rendered against a non-resident, without any other service of process than a service made in the State where he resides, and without his voluntary appearance, will not support an action of debt. *Kibbe v. Kibbe*, Kirb. 126.

In an action on a judgment rendered in another State, the de-

fendant may show that he had no legal notice of the suit, and did not appear or authorize any appearance in his behalf; although the record of it state that he appeared by S, his attorney. *Aldrich v. Kinney*, 4 Conn. 387.

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As to the effect of the provisions of the United States Constitution and statute, see *Harrington v. Harrington*, 154 Mass. 517.

The judgments of sister States may be attacked collaterally for want of jurisdiction whatever may be the jurisdictional averments of the records. *Gilman v. Gilman*, 126 Mass. 26, 27.

The recitals of foreign judgments are *prima facie* evidence only of jurisdiction. *Wright v. Andrews*, 130 Mass. 149.

A foreign judgment may be attacked collaterally for lack of jurisdiction. *Rothrock v. Dwelling-House Ins. Co.*, 161 Mass. 423.

A party cannot impeach a judgment of a sister State collaterally for fraud. *Mooney v. Hinds*, 160 Mass. 467.

CHAPTER V.*

OPINIONS, WHEN RELEVANT AND WHEN NOT.

ARTICLE 48.

OPINION GENERALLY IRRELEVANT.

THE fact that any person is of opinion that a fact in issue, or relevant or deemed to be relevant to the issue, does or does not exist is deemed to be irrelevant to the existence of such fact, except in the cases specified in this chapter.

Illustration.

The question is, whether A, a deceased testator, was sane or not when he made his will. His friends' opinions as to his sanity, as expressed by the letters which they addressed to him in his lifetime, are deemed to be irrelevant.¹

AMERICAN NOTE.

GENERAL.

Authorities.—1 Wharton on Evidence, sec. 509 *et seq.*; 1 Greenleaf on Evidence (15th ed.), sec. 440, and notes, and vol. 2, sec. 371; 12 Am. & Eng. Encyclopædia of Law (2d ed.), sec. 488 *et seq.*; Lawson on Expert and Opinion Evidence, chaps. 1-7.

Witnesses may give their opinions in connection with facts when the matter cannot otherwise be reproduced or made palpable. *Fayette v. Chesterville*, 77 Me. 28, 52 Am. Rep. 741; *Lester v. Pittsford*, 7 Vt. 158; *Morse v. Crawford*, 17 Vt. 499; *Cram v. Cram*, 33 Vt. 15; *Bates v. Sharon*, 45 Vt. 474; *Clifford v. Richardson*, 18 Vt. 620; *Cavendish v. Troy*, 41 Vt. 99.

* See Note XXIV.

¹ *Wright v. Doe d. Tatham*, 1837, 7 A. & E. 313.

Where the circumstances are such that opinion evidence is the best that can be had, eye-witnesses may state their opinions. *Hardy v. Merrill*, 56 N. H. 227, 241, 22 Am. Rep. 441. See also dissenting opinion of Doe, J., in *State v. Pike*, 49 N. H. 408.

Upon the issue of sanity, witnesses to particular facts may give their opinion in connection with such facts. *Hardy v. Merrill*, 56 N. H. 227, 22 Am. Rep. 441.

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Where the opinion of one is a relevant fact he may state that opinion. *Allen v. Hartford Life Ins. Co.*, 72 Conn. 697.

Where the circumstances are such that opinion evidence is the best that can be had, eye-witnesses may state their opinions. *Sytleman v. Beckwith*, 43 Conn. 9, 11.

A witness cannot be asked whether a previous witness, who has testified to certain things, "had any ground" for so testifying. *Lovell v. Hammond Co.*, 66 Conn. 501.

Opinions of persons not experts may be admitted when they are those of practical and observing men, of the result of their own observations and knowledge, upon a question the particular elements of which are so numerous and the character of which is such that it is impracticable for them to state the facts fully. *Barker v. Manchester*, 72 Conn. 684.

Sanity.—A non-expert witness, having stated the extent of his personal acquaintance, may give an opinion as to sanity. *State v. Cross*, 72 Conn. 722.

The mere opinion of a non-expert witness concerning the mental condition of a testator is never admissible. It is admissible only in connection with the particular facts on which it is based or after the witness has been shown to have sufficient means and opportunities of personal observation to enable him to form a reasonably correct conclusion. They are received rather as statements of impressions or conclusions in the nature of facts of which the witness has knowledge than as opinions. *Turner's Appeal*, 72 Conn. 315.

A non-expert who has had sufficient opportunity of observation may be asked, "Was the testator, in your opinion, a person of sound mind" or whether he possessed sufficient understanding to be able to transact the ordinary business matters incident to the management of his household affairs and property, or to compare his mental power with that of an average child of seven or eight years. *Turner's Appeal*, 72 Conn. 316.

A witness called by the contestants of a will gave it as her opinion from her observation of the testatrix, that at the time the will was made her mental capacity was not greater than that of an average child of seven or eight years. Held, that she had a right to illustrate her conception of her condition by such a comparison. *Richmond's Appeal*, 59 Conn. 242.

A non-expert witness, having detailed the facts and given his opinion of the mental condition of a testator, may be asked on his direct examination if he had ever observed anything to indicate unsoundness; and the value of the answer may be shown upon cross-examination. *Kimberly's Appeal*, 68 Conn. 428.

Upon the competency of a testatrix, witnesses were asked to state, from what they saw of her, and from their interviews, what they should say as to her soundness of mind, and each answered that he considered her of sound mind, that she was a superior business woman, and that he had never noticed any change in her appearance. Held admissible. *Shanley's Appeal*, 62 Conn. 330.

While in all cases where a non-expert witness testifies to his opinion in such a case it is important that he should be able to state such facts as will show presumptively that his opinion is well founded, yet it is not a correct proposition that his opinion is entitled to consideration only so far as the facts stated sustain it. *Shanley's Appeal*, 62 Conn. 330.

Where the opinion of the witness is based on his acquaintance with the person and his opportunities for observation, these are facts of a peculiar class, which cannot be reproduced, but can only be stated, and a full statement of them by the witness is sufficient. *Shanley's Appeal*, 62 Conn. 330.

The question was not merely whether the testatrix was of sound mind when the will was made, but whether she had become of unsound mind, as indicated by changes in her appearance and conduct. In such a case the acquaintance of the witness with her before and after that date and his opportunities to see her in the latter period and to observe what changes there were in her conduct and appearance, and to state them if there were any; and if there were none to so state, were facts of the highest significance. *Shanley's Appeal* 62 Conn. 330.

Instances.—It is not error to permit a witness in reply to a proper question to testify that goods were "sold to the plaintiff on an order given by H," though the question whether the transaction constituted a sale, and whether the plaintiff was in legal effect the vendee, were

questions of mixed law and fact in dispute in the case. No harm is done by permitting the witness to state the matter in the natural mode of speech, as it appears to him. *C. & C. El. Motor Co. v. D. Frisbie & Co.*, 66 Conn. 67.

In reply to a question as to what the plaintiff said in such conversation, X replied that "he led me to infer," etc. Held, that while this answer was erroneous in point of form, it was within the discretion of the trial court to allow it to stand. *Wheeler v. Thomas*, 67 Conn. 577.

Testimony that the use of land by the public was of common convenience and necessity, held not to be inadmissible as mere opinion. The common convenience and necessity of a highway is not a matter of opinion, apart from the facts on which it is based, but a fact provable by showing the location, the surrounding property, the nature and extent of the business carried on in the neighborhood, the population and the like, supplemented by the judgment of practical men. *Spencer v. N. Y. & N. E. R. R. Co.*, 62 Conn. 244.

In an action for injuries received from the bite of a dog, W, an eye-witness, testified for the plaintiff as to the circumstances and character of the injury. Held, that he might be asked, on cross-examination, if he had not previously declared that the dog was not to blame, and that, upon his answering in the negative, evidence of such a declaration might be received to contradict him; since it might not be mere matter of opinion, but might have a tendency to show that he had not testified truly as to all the facts. *Burns v. Fredericks*, 37 Conn. 91, 92.

Testimony of witnesses well acquainted with one claimed to be a minor, that they should think from his appearance that he was not over seventeen is inadmissible; but their testimony to facts indicative of his age, accompanied with their opinion of it, might be admissible. *Morse v. State*, 6 Conn. 13.

A defendant whose barn is complained of as a nuisance may show that the odors and noises come or might have come from other sources; and, having shown how his barn was kept, he may then inquire of a witness experienced in such matters, to what extent odors could arise from a barn so cared for. *Kaspar v. Dawson*, 71 Conn. 405.

The opinions of non-expert witnesses are admissible under our practice as to the defective and dangerous condition of a highway or bridge, and they are not limited to a mere statement of the facts

upon which their opinions are formed. *Ryan v. Town of Bristol*, 63 Conn. 38.

Unskilled persons, after stating facts within their knowledge, may sometimes be allowed to give their opinion, based thereon, *e. g.*, as to the sufficiency of a dam, the safety of a road or bridge, or the probability that a gentle horse would be frightened at a certain object. *Clinton v. Howard*, 42 Conn. 306-309.

Upon the question of the sufficiency of a dam, constructed in the ordinary manner, the opinions of non-professional witnesses, acquainted with the character of the stream, in connection with their testimony as to the facts is admissible. *Porter v. Pequonnoc Mfg. Co.*, 17 Conn. 255-257.

In an action for leaving a pile of stones on a highway, at which the plaintiff's horse shied,—Held, that a witness, who saw the accident, and was familiar with the management of horses, might be asked whether such a pile of stones would be likely to make an ordinary gentle horse shy. *Clinton v. Howard*, 42 Conn. 306-309.

To prove that a horse warranted kind was not so, a witness, after testifying to his knowledge of particular facts in regard to the horse, and of its conduct on various occasions, was asked, "From your knowledge of the horse, was he, in your opinion, a safe, kind horse?" Held, that the question was properly admitted. *Sydleman v. Beckwith*, 43 Conn. 11-13.

And the weight to be given to this opinion is not to be determined by looking to the particular facts previously testified to, and deciding how far these bear it out. *Sydleman v. Beckwith*, 43 Conn. 13.

In case for a nuisance, where the question was whether a certain privy and pigsty were nuisances, it was held, that witnesses who had examined the premises, and were acquainted by personal observation with the effect upon the air in such cases, might testify, in connection with the facts, to their opinions founded on the facts, that the effluvia from the privy and sty must necessarily render the plaintiff's house uncomfortable. *Kearney v. Farrell*, 28 Conn. 319.

Where the question is as to the ability of a witness to hear a certain sound if it had been made, it is not a ground for a new trial if the witness is allowed to give his opinion that he should have heard it if it had been made, where the distance and all the other circumstances are stated. *Burnham v. Sherwood*, 56 Conn. 233, 234.

And held, that where a witness was allowed to give such opinion

in his examination in chief, and on cross-examination stated all the circumstances fully, the admission of the opinion in the first instance was not a sufficient ground for granting a new trial. *Burnham v. Sherwood*, 56 Conn. 233, 234.

A witness who has not observed whether a railroad platform is well lighted or not cannot be asked whether it was a reasonably safe place in respect to light for passengers to get off. *Chamberlain v. Platt*, 68 Conn. 126.

A witness testified that he placed a seat in a wagon "in a manner that he thought secure." Held inadmissible, because a statement of a mere opinion without the facts. *Bassett v. Shares*, 63 Conn. 45, 46.

The opinion of an officer as to what goods under attachment would bring at forced sale is in itself inadmissible. *Norwalk v. Ireland*, 68 Conn. 1.

In cases of personal identity, handwriting, value of property and the like, the witness states the result of his observation or judgment rather as a fact than an opinion. *Chamberlain v. Platt*, 68 Conn. 130.

Where the question was whether A, who procured a policy of insurance for the plaintiffs, was the agent of the plaintiffs or of the insurance company, his testimony that he "acted as agent of the insurance company" was held inadmissible. Whether he was such an agent would be a conclusion of law upon the facts, and he could testify only to facts. *Young v. Newark Fire Ins. Co.*, 59 Conn. 46.

One who had worked in building a water-wheel during the whole progress of its construction, after testifying to this, and that he did not remember that one B worked on the wheel, was asked if B could have done much work upon it without his knowledge. Held, that the question was improper, as this was an inference for the triers to draw. *Butler v. Cornwall Iron Co.*, 22 Conn. 359.

The opinion of two members of a committee that their judgment was not affected by improper evidence which they received upon the hearing is not reliable and should not be received. *Borough of Norwalk v. Blanchard*, 56 Conn. 465.

Whether, to prove what points are decided by a judgment rendered on the general issue tried to the court, the judge who tried the case may not be called in to testify to the conclusions which led him to render the particular judgment, *quære*. *Supples v. Cannon*, 44 Conn. 430, and note by the Reporter, 432-434.

Evidence that the railroad commissioners had frequently passed

over a railroad, but had never advised that cattle-guards should be made at a crossing, where the absence of a cattle-guard is claimed to evince negligence unaccompanied by evidence that attention was called to such crossing, is scarcely admissible to show that the latter did not think cattle-guards necessary, and certainly not conclusive that such was their opinion. *Bulkley v. N. Y. & N. H. R. R. Co.*, 27 Conn. 487.

Evidence of opinions expressed by a party as to the legal construction of an instrument, under which he claims, is inadmissible, either for or against him. *Crosby v. Mason*, 32 Conn. 487.

In an action on a marine insurance policy, the defendants, for the purpose of showing fraud in respect to the loss claimed, introduced evidence that, within four years, the plaintiff had claimed from other insurers for eight losses of the same general description. Held, that the plaintiff could not be then permitted to show that all these insurers had paid him for these losses without making any claim of fraud; this being nothing more than evidence of the opinion of a third party. *Howie v. Home Ins. Co.*, 33 Conn. 472.

In an action of ejectment for land known as "the swamp lot," one of the parties offered evidence as to what his grantor had "understood by the swamp lot." Held, to be inadmissible, both as irrelevant, and as calling for a mere matter of conjecture. *Gorham v. Gorham*, 41 Conn. 244.

The defendant, on his cross-examination, was asked if he had not heard X testify that he never owed him, the defendant, anything. Held, that such question was not objectionable as requiring the witness to give a statement of X's testimony, or put an interpretation upon it. *Wheeler v. Thomas*, 67 Conn. 577.

The mere opinion of a witness as to the pecuniary ability of a party, upon whatever facts founded, is inadmissible. *Babcock v. Middlesex Savings Bank*, 28 Conn. 306.

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Where the circumstances are such that opinion evidence is the best that can be had, eye-witnesses may state their opinions. *Com. v. Sturtivant*, 117 Mass. 122, 123, 19 Am. Rep. 401.

A non-expert may state his opinion as to the following matters: Identity of persons, things or handwriting; size, color or weight; time or distance; character of sounds and whence they proceed. *Com. v. Sturtivant*, 117 Mass. 122, 133.

Kindly treatment. *Baldwin v. Parker*, 99 Mass. 79.

Character of a foundation. *Bardwell v. Conway Ins. Co.*, 122 Mass. 90.

Rate of expenditure of a person. *Griffin v. Brown*, 2 Pick. 304.

That one seemed sad. *Culver v. Dwight*, 6 Gray, 444.

Or took no interest in what was going on. *Com. v. Piper*, 120 Mass. 185.

Whether a road is dangerous. *Lund v. Tyngsborough*, 9 Cush. 36.

Whether "horn chains" are fragile. *Swett v. Shumway*, 102 Mass. 365.

As to a person's age. *Com. v. O'Brien*, 134 Mass. 198.

Whether hairs are those of a human being. *Com. v. Dorsey*, 103 Mass. 412; *Com. v. Sturtivant*, 117 Mass. 122.

Whether a foot and footprints correspond. *Com. v. Pope*, 103 Mass. 440.

As to whether one was careful and temperate. *Gahagan v. B. & L. R. R. Co.*, 1 Allen, 187.

ARTICLE 49.

OPINIONS OF EXPERTS ON POINTS OF SCIENCE OR ART.

When there is a question as to any point of science or art, the opinions upon that point of persons specially skilled in any such matter are deemed to be relevant facts.

Such persons are hereinafter called experts.

The words "science or art" include all subjects on which a course of special study or experience is necessary to the formation of an opinion,² and amongst others the examination of handwriting.

When there is a question as to a foreign law the opinions of experts who in their profession are acquainted with such law are the only admissible evidence thereof, though such experts may produce to the Court books which they declare

² 1 Smith's Leading Cases, 474 *et seq.*; (note to *Cater v. Boehm*, 1663), 28 Vict. c. 18, s. 8.

to be works of authority upon the foreign law in question, which books the Court, having received all necessary explanations from the expert, may construe for itself.³

It is the duty of the judge to decide, subject to the opinion of the Court above, whether the skill of any person in the matter on which evidence of his opinion is offered is sufficient to entitle him to be considered as an expert.⁴

The opinion of an expert as to the existence of the facts on which his opinion is to be given is irrelevant, unless he perceived them himself.⁵

Illustrations.

(a) The question is, whether the death of A was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are deemed to be relevant.⁶

(b) The question is, whether A at the time of doing a certain act, was by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are deemed to be relevant.⁷

(c) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

³ *Baron de Bode's Case*, 1845, 8 Q. B. 267; *Di Sora v. Phillipps*, 1863, 10 H. L. Ca. 624; *Castrique v. Imrie*, 1870, L. R. 4 H. L. at p. 434; see, too, *Picton's Case*, 1806, 30 S. T. 510 *et seq.*

⁴ *Bristow v. Sequeville*, 1850, 6 Ex. 275; *Rowley v. L. & N. W. Railway*, 1873, L. R. 8 Ex. 221. *In the Goods of Bonelli*, 1875, L. R. 1 P. D. 69; and see *In the Goods of Dost Aly Khan*, 1880, L. R. 6 P. D. 6.

⁵ 1 Ph. 520; Taylor, 1421.

⁶ *R. v. Palmer*, 1856 (*passim*). See my 'History of Crim. Law,' iii. 389.

⁷ *R. v. Dove*, 1856 (*passim*). 'History Crim. Law,' iii. 426.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are deemed to be relevant.⁸

(d) The opinions of experts on the questions, whether in illustration (a) A's death was in fact attended by certain symptoms; whether in illustration (b) the symptoms from which they infer that A was of unsound mind existed; whether in illustration (c) either or both of the documents were written by A, are deemed to be irrelevant.

AMERICAN NOTE.

GENERAL.

Authorities.—Lawson on Expert and Opinion Evidence (2d ed.), chaps. 1-7; 12 Am. & Eng. Encyclopædia of Law (2d ed.), p. 414 *et seq.*

(First paragraph of text.) *Page v. Parker*, 40 N. H. 47, 58; *Hammond v. Woodman*, 41 Me. 177, 66 Am. Dec. 219, n.

Within the meaning of the rule, every business or employment which has a particular class devoted to its pursuit, is a science or art. Lawson on Expert and Opinion Evidence (2d ed.), p. 3.

Among the persons whose testimony may be admitted as that of experts are the following: Assayers. *State v. Knight*, 43 Me. 19. Photographers. *Marston v. Dingley*, 88 Me. 546. Surveyors. *Barron v. Cobleigh*, 11 N. H. 557, 35 Am. Dec. 505; *Wallace v. Goodale*, 18 N. H. 439.

Foreign law.—*Barrows v. Downs*, 9 R. I. 447, 11 Am. Rep. 283.

A magistrate, who is not a lawyer, may be a competent witness as to the law of his jurisdiction. *Rickard v. Bailey*, 26 N. H. 169.

To the same effect is *Hall v. Costello*, 48 N. H. 179.

In the absence of proof of a foreign law, the common law of the forum is applied. *Carpenter v. Grand Trunk R. R. Co.*, 72 Me. 388; *O'Reilly v. N. Y., etc., R. R. Co.*, 16 R. I. 389.

To prove a foreign written law, expert evidence is admissible either with or without a copy of such law. *Barrows v. Downs*, 9 R. I. 446.

The common law of another State may be proven by expert evidence. *Jenne v. Harrisville*, 63 N. H. 405.

In Maine, by statute, the law reports of another State may be read in evidence. Maine Rev. Stat., chap. 82, secs. 108, 109.

As to proving laws and treaties of the United States, see U. S. Rev. Stat., sec. 908.

As to authentication of the laws of other States and territories of the United States and countries subject to its jurisdiction, see U. S. Rev. Stat., sec. 905.

Examination of handwriting.—*Withee v. Rowe*, 45 Me. 571, 589.

Testimony as to facts.—*Spear v. Richardson*, 37 N. H. 23, 34.

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The test as to the admissibility of expert testimony is not whether the subject-matter is uncommon, or whether many have knowledge of it, but whether the witnesses have any peculiar knowledge or experience not common to the world. *Taylor v. Monroe*, 43 Conn. 44.

Professional road builders may be brought in as experts to testify whether, at a particular point in a highway, a particular kind of railing is or is not sufficient. *Taylor v. Monroe*, 43 Conn. 43-45.

A civil engineer may testify that stakes, each having a nail in the top, found near his survey line, are surveyor's stakes. *McGann v. Hamilton*, 58 Conn. 73.

Upon a trial for murder in the first degree, it was claimed that the prisoner was intoxicated. Held, to be no error not to allow a medical expert who had made a personal examination of the prisoner to be asked whether, in his opinion, he was not easily affected by liquors, the question for the jury being wholly as to his actual condition, as to which direct evidence was offered. *State v. Smith*, 49 Conn. 381, 382.

Persons familiar with the business of making carriages may be allowed to testify as experts as to their value, upon the testimony of others as to their character and condition, even though they have not seen the carriages themselves. *Beach v. Clark*, 51 Conn. 202.

The plaintiff, while driving a wagon, was run into by an electric car. In an action for damages it was held, that expert testimony to show what would constitute proper management of an electric car was admissible. *Laufer v. Bridgeport Traction Co.*, 68 Conn. 475.

While experts may define terms of art and, when necessary, explain the principles of their science, they cannot be permitted to instruct the court as to the meaning and legal interpretation of a written instrument, or to give their opinion thereon. *Fuller v. Metropolitan Life Ins. Co.*, 70 Conn. 647.

Evidence is admissible from witnesses familiar with the business

of stockbrokerage to show the meaning of the words "on margin," that term being used by stockbrokers and having acquired a special and well-understood meaning in their business. *Hatch v. Douglas*, 48 Conn. 128, 129.

An engineer who has had experience in making plans and estimates for the building of bridges and has superintended their construction, can testify as an expert with regard to the probable cost of a bridge, although he has had no experience as a practical bridge builder. *Bryan v. Town of Branford*, 50 Conn. 248.

And it does not affect the case that he has obtained the prices of the materials from dealers. *Bryan v. Town of Branford*, 50 Conn. 249.

Upon the question whether symptoms were those of acute melancholia or of morphine poisoning, there was offered a nurse who had attended a patient suffering from the use of morphine. It appeared that she had received no medical education nor any training as a nurse, that she did not know what quantity of morphine would be given by a physician in a dose, and had no other knowledge of certain cases to which she referred than any woman of ordinary intelligence might have had. Held, that she could not be regarded as an expert, and that her testimony was properly rejected. *Osborne v. Troup*, 60 Conn. 496.

In an action by an indorsee, on a note of suspicious appearance, and which was procured by fraud, the defense was that the plaintiff, a broker, had discounted it in bad faith. Held, that evidence from other brokers in the same place, that no broker would have discounted such a note, without a willful failure to inquire into its origin, was inadmissible. *Rowland v. Fowler*, 47 Conn. 348.

An opinion of a financier is not admissible as to the effect of the non-payment of coupons of first mortgage bonds on the value of the second mortgage bonds. This was a matter to be shown by facts, from which the jury could form an opinion for themselves. *Ætna Nat. Bank v. Charter Oak Life Ins. Co.*, 50 Conn. 192.

One familiar with the running of handcars may testify, in an accident suit, as to whether there was time for the plaintiff to jump off in order to avoid injury. *Quinn v. N. Y., N. H. & H. R. R. Co.*, 56 Conn. 52, 53.

The defendant contracted to purchase of the plaintiff all the furniture in a certain hotel used by him in the business of inn-keeping. Held, that the plaintiff, upon the trial, might properly introduce the testimony of hotel-keepers, that a piano was, in their

opinion, a proper article of hotel furniture. *Crossman v. Baldwin*, 49 Conn. 492.

For the purpose of proving that the defendants' ounce packages of hairpins so closely resembled those of the plaintiffs' as to mislead an ordinary purchaser, the plaintiffs offered the testimony of several persons, who were or had been wholesale dealers in hairpins, as experts. The committee received the evidence notwithstanding the defendants' objection. Held, no error. *Williams v. Brooks*, 50 Conn. 285.

The parties were at issue as to whether a pair of horses were sound when sold in May. The defendant, to prove them unsound, offered to show that in the following October they were examined by a veterinary surgeon and found to be unsound, and that in the opinion of such surgeon the unsoundness was of such a nature as to indicate its existence at the time of sale. Held, that the trial court erred in excluding the testimony. *Bristol v. Galway*, 68 Conn. 248.

To prove that a physician was not carrying on a "regular, legitimate, allopathic practice," held, that the testimony of a regular, allopathic physician, in the same town, that the former was not associated with him as one of the regular physicians of the place, and that his practice was not regular and legitimate, was admissible. *Bradbury v. Bardin*, 35 Conn. 581.

And, perhaps, testimony from such a witness, to the effect that the regular medical association would not associate with the party in question, because his practice was irregular, would be admissible. *Bradbury v. Bardin*, 35 Conn. 581.

Real estate brokers may be admitted to testify as to the customary charge for commissions on sales. *Elting v. Sturtevant*, 41 Conn. 180.

Attorneys cannot be called as witnesses to testify to the practical construction of an ancient statute. *Gaylor's Appeal*, 43 Conn. 84.

Question of qualification for the judge.—Sustaining text: *State v. Main*, 69 Conn. 141.

The acceptance of a public office and the performance of its duties are circumstances which a court may consider in determining whether to permit the incumbent to testify as an expert in matters relating to his duty, even if he should not be regarded as presumably qualified by virtue of his office. *State v. Main*, 69 Conn. 124.

The decision of a judge in admitting a witness to testify as an expert will not be reviewed unless it is clearly shown to have been

based on incompetent or insufficient evidence. *State v. Main*, 69 Conn. 124.

Foreign laws.—As to public statutes of other States and territories, see Gen. Stats., sec. 1087.

A printed book, purporting to be a copy of the statutes of another State, is not evidence of such statutes. *Bostwick v. Bogardus*, 2 Root, 250. But, now, see Gen. Stat., sec. 1087.

Practicing lawyers of another State may testify as to the law of that State. *Dyer v. Smith*, 12 Conn. 386.

The law of the forum cannot be proved by the testimony of lawyers. *Gaylor's Appeal*, 43 Conn. 82.

Form of question.—It is the proper way, in examining an expert, to state all the particulars upon which his opinion is sought. But the direction of the matter lies within the discretion of the presiding judge. *Roraback v. Pennsylvania Co.*, 58 Conn. 294.

An expert ought not to be allowed to give his opinion as to the genuineness of a signature, derived from a comparison of signatures which are not before the court. *Tyler v. Todd*, 36 Conn. 223.

But, if such evidence is not objected to, the adverse party cannot require the production of the signatures so examined. *Tyler v. Todd*, 36 Conn. 223.

It is within the discretion of the trial court to exclude a hypothetical question, until a foundation for it has been laid by the evidence. *Porter v. Ritch*, 70 Conn. 235.

Where an expert is asked his opinion upon certain facts proved, the weight of authority is that the facts should be stated in the question. *Barber's Appeal*, 63 Conn. 408.

So far as any discretion is to be allowed it must be used sparingly. *Barber's Appeal*, 63 Conn. 408.

The question should present such assumptions only, as counsel may fairly claim that the evidence tends to justify, and while it may not be improper because it includes only a part of the facts, it would be so if, by reason of such omission, it failed to present the facts which it did include in their true relation. *Barber's Appeal*, 63 Conn. 409.

Upon the question whether the plaintiff had been internally injured in the chest, there being no marks, the following question was asked by the plaintiff's counsel of a medical expert: "In your opinion can or cannot the tissue of the lungs be broken by violent outside pressure, if at the time the lungs are inflated, so as to produce hemorrhage without visible external cause?" Held, to be no

objection to the question that there was no proof that the lungs were inflated at the moment of the injury, that being a matter hardly admitting of proof. The question could only be understood as referring to such inflation as would occur during the regular process of respiration. *Tompkins v. West*, 56 Conn. 484.

In proving the value of property for the purposes of a foreclosure the rental value may be shown. Also what it would cost to reproduce the buildings. *Winchell v. Coney*, 54 Conn. 34.

In showing the rental value it is questionable whether the mere judgment of an expert would be proper evidence. The rents actually received, deducting therefrom the expense, would ordinarily be the proper proof. *Winchell v. Coney*, 54 Conn. 34.

MASSACHUSETTS.

The following are proper subjects of expert evidence: How much sand is used with a cask of lime. *Miller v. Shay*, 142 Mass. 598.

Whether the end of a drain in a cellar should be open. *Stead v. Worcester*, 150 Mass. 241.

As to the normal condition of the private parts of a girl. *Com. v. Lynes*, 142 Mass. 577.

But not whether a certain piece of land is large enough for a house and stable. *Pierce v. Boston*, 164 Mass. 92.

He may testify as to the cause of death. *Com. v. Thompson*, 159 Mass. 56.

Examination of handwriting.—Sustaining text: *Moody v. Rowell*, 17 Pick. 490, 28 Am. Dec. 317.

Foreign law.—Practicing lawyers of another State may testify as to the law of that State. *Mowry v. Chase*, 100 Mass. 79.

In the absence of proof, the foreign law is presumed to be the same as that of the forum. *Kelley v. Kelley*, 161 Mass. 111; *Dickson v. United States*, 125 Mass. 311; *McIntyre v. B. & M. R. R. Co.*, 163 Mass. 189.

In Massachusetts, by statute, the law reports of another State may be read in evidence. Pub. Stat., chap. 169, secs. 72, 73.

Question of qualification for the judge.—Sustaining text: *Perkins v. Stickney*, 132 Mass. 217; *Hawks v. Charlemont*, 110 Mass. 110; *Com. v. Williams*, 105 Mass. 68.

ARTICLE 50.*

FACTS BEARING UPON OPINIONS OF EXPERTS.

Facts, not otherwise relevant, have in some cases been permitted to be proved, as supporting or being inconsistent with the opinions of experts.

Illustrations.

(a) The question was, whether A was poisoned by a certain poison.

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms alleged to be the symptoms of that poison, were deemed to be relevant.⁹

(b) The question is, whether an obstruction to a harbour is caused by a certain bank. An expert gives his opinion that it is not.

The fact that other harbours similarly situated in other respects, but where there were no such banks,¹⁰ began to be obstructed at about the same time, is deemed to be relevant.

AMERICAN NOTE.

Authorities.—See *Com. v. Leach*, 156 Mass. 99; *Lincoln v. Taunton Mfg. Co.*, 9 Allen, 181.

* I have altered the wording of this article, so as to make it less absolute than it was in earlier editions. The admission of such evidence is rare and exceptional, and must obviously be kept within narrow limits. At the time of Palmer's trial only two or three cases of poisoning by strychnine had occurred.

⁹ *R. v. Palmer*, 1856, printed trial, p. 124, &c., 'Hist. Crim. Law,' iii. 389. In this case evidence was given of the symptoms attending the deaths of Agnes Senet, poisoned by strychnine in 1845, Mrs. Serjeantson Smith, similarly poisoned in 1848, and Mrs. Dove, murdered by the same poison subsequently to the death of Cook, for whose murder Palmer was tried.

¹⁰ *Foulkes v. Chadd*, 1782, 3 Doug. 157.

ARTICLE 51.

OPINION AS TO HANDWRITING, WHEN DEEMED TO BE
RELEVANT.

When there is a question as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the supposed writer that it was or was not written or signed by him, is deemed to be a relevant fact.

A person is deemed to be acquainted with the handwriting of another person when he has at any time seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.¹¹

Illustration.

The question is, whether a given letter is in the handwriting of A, a merchant in Calcutta.

B is a merchant in London, who has written letters addressed to A, and received in answer letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon.

The opinions of B, C, and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C, nor D ever saw A write.¹²

¹¹ See Illustration.

¹² *Doe v. Sackermore*, 1836, 5 A. & E. 705 (Coleridge, J.); 730 (Patteson, J.); 739-740 (Denman, C. J.).

The opinion of E, who saw A write once twenty years ago, is also relevant.¹³

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), sec. 577; Lawson on Epert and Opinion Evidence (2d ed.), tit. 2, chap. 2; *Hammond's Case*, 2 Greenl. (Me.) 33, 11 Am. Dec. 38.

One who has seen him write.—*Diggin's Estate*, 68 Vt. 198.

CONNECTICUT.

In case of handwriting the witness states the result of his observation or judgment as a fact rather than an opinion. *Chamberlain v. Platt*, 68 Conn. 130.

To prove handwriting of a party, evidence is admissible from one who has seen him write, that he believes the writing in question to be his, but cannot determine it to be his, except by comparing it with other writings proved to be genuine. *Lyon v. Lyman*, 9 Conn. 59.

MASSACHUSETTS.

Keith v. Lathrop, 10 Cush. 453.

One who has become familiar with another's handwriting in the course of his business (*e. g.*, as clerk of a court), may testify, although he has never seen him write. *Com. v. Carey*, 2 Pick. 47; *Amherst Bank v. Root*, 2 Metc. 522.

But a teller of a bank does not come within this rule, where he seeks to testify whether some of the checks which went through his hands in the usual way were forged or not. *Brigham v. Peters*, 1 Gray, 139.

One may be a competent witness to handwriting who cannot read or write. *Foye v. Patch*, 132 Mass. 105.

One who has seen him write.—Sustaining text: *Com. v. Hall*, 164 Mass. 152.

It is enough that he has seen him write once to render the testimony competent. *Com. v. Nefus*, 135 Mass. 533; *Keith v. Lathrop*, 10 Cush. 453; *Brigham v. Peters*, 1 Gray, 139.

One who has received letters.—*Chaffee v. Taylor*, 3 Allen, 598.

It is not enough that he has seen letters addressed to others. *Heunes v. Perry*, 113 Mass. 274.

¹³ *R. v. Horne Tooke*, 1794, 25 S. T. 71–72.

ARTICLE 52.

COMPARISON OF HANDWRITINGS.

Comparison of a disputed handwriting with any writing proved to the satisfaction of the judge to be genuine is permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute. This paragraph applies to all courts of judicature, criminal or civil, and to all persons having by law, or by consent of parties, authority to hear, receive, and examine evidence.¹⁴

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), sec. 579 *et seq.*; 15 Am. & Eng. Encyclopædia of Law (2d ed.), p. 272; *State v. Thompson*, 80 Me. 194; *State v. Hastings*, 53 N. H. 452; *Rowell v. Fuller*, 59 Vt. 688; Gen. Stats. of Rhode Island, chap. 246, sec. 44.

Papers may be admitted in some States for the sole purpose of comparison. *State v. Thompson*, 80 Me. 194, 6 Am. St. Rep. 172, 13 Atl. 892.

On cross-examination a person's signature, written in court, may sometimes be used. *Chandler v. Le Barron*, 45 Me. 534.

¹⁴ 28 Vict. c. 18, s. 8, re-enacting 17 & 18 Vict. c. 125, s. 25, now repealed. See *R. v. Silverlock*, [1894], 2 Q. B. 766, where it was held that the solicitor for the prosecution was a proper witness to compare handwriting proved to be that of the prisoner with that in which documents produced by the prosecution were written. It seems to be the case that such a witness must be "skilled" or, as Lord Russell said, "peritus;" but he need not "have become peritus in the way of his business or in any definite way;" *vulgo*, he need not be a professional expert.

CONNECTICUT.

In a libel suit, to prove the libel to be in the defendant's handwriting, experts, as cashiers of banks, may be admitted to testify that they have compared the paper with other writings proved to be his, and that, in their opinion, the paper was written by him, in a disguised hand. *Lyon v. Lyman*, 9 Conn. 59.

To prove that a libellous paper is in the handwriting of the defendant, who is sued as its author, other documents, admitted to have been written by him, may be given to the jury, for them to compare with the one in question, and thereby to ascertain whether that was written by him. *Lyon v. Lyman*, 9 Conn. 60-63.

Where it is claimed that a signature is forged, it is our practice to permit it to be compared, in court, with others which are genuine. But such others must be first admitted or proved to be genuine, and a signature, the genuineness of which is not thus established, cannot be used even in cross-examination. *Tyler v. Todd*, 36 Conn. 222.

An expert ought not to be allowed to testify to an opinion as to the genuineness of a signature, formed upon a comparison of signatures not in court. *Tyler v. Todd*, 36 Conn. 223.

Experts called to testify as to their opinion of the handwriting of disputed documents when compared with admitted or proved standards, cannot be cross-examined as to other writings of unknown authorship, not pertinent to the case, merely to test their ability as experts. *State v. Griswold*, 67 Conn. 290.

Whether the court has authority to require a party to write his name in court, in order that the jury may compare writings, *quære*. It probably has such power. But where the disputed writing had so faded out that it could not be traced, so that it could not be seen by the jury, but only described to them, it was held, that it was not a case for such an order. *Smith v. King*, 62 Conn. 521, 522.

MASSACHUSETTS.

Costello v. Crowell, 139 Mass. 588; *Costello v. Crowell*, 133 Mass. 352; *Com. v. Andrews*, 143 Mass. 23.

Papers may not be admitted, as a matter of right, in some States for the sole purpose of comparison by the jury. They may be used by an expert for such purpose, however. *Com. v. Allen*, 128 Mass. 46.

A signature, written in court, may not be used for comparison, except on cross-examination. *Com. v. Allen*, 128 Mass. 46; *King v. Donahue*, 110 Mass. 155.

Letter-press copies cannot be used in comparison. *Com. v. Eastman*, 1 Cush. 189.

But photographic copies may when the originals are in court. *Marcy v. Barnes*, 169 Mass. 161.

ARTICLE 53.

OPINION AS TO EXISTENCE OF MARRIAGE, WHEN RELEVANT.

When there is a question whether two persons are or are not married, the facts that they cohabited and were treated by others as man and wife are deemed to be relevant facts, and to raise a presumption that they were lawfully married, and that any act necessary to the validity of any form of marriage which may have passed between them was done; but such facts are not sufficient to prove a marriage in a prosecution for bigamy or in proceedings for a divorce, or in a petition for damages against an adulterer.¹⁵

AMERICAN NOTE.

GENERAL.

Authorities.—Greenleaf on Evidence (15th ed.), vol. i, sec. 107; vol. 2, sec. 462 *et seq.*; Abbott's Trial Evidence (2d ed.), p. 104.

(First paragraph of the text.) *Young v. Foster*, 14 N. H. 114, 118; *State v. Sherwood*, 68 Vt. 419 (citing this article); see Vermont Statutes, sec. 5060.

Marriage cannot be proven by reputation in criminal prosecutions for bigamy, incest, adultery, unlawful cohabitation or criminal conversation. *State v. Hodgskins*, 19 Me. 155. Compare *Clayford's Case*, 7 Me. 57.

¹⁵ *Morris v. Miller*, 1767, 4 Burr. 2057; *Birt v. Barlow*, 1779, 1 Doug. 170; and see *Catherwood v. Caslon*, 1844, 13 M. & W. 261. Compare *R. v. Mainwaring*, 1856, Dear. & B. 132. See, too, *De Thoren v. A. G.*, 1876, 1 App. Cas. 686; *Piers v. Piers*, 1849, 2 H. L. Ca. 331. Some of the references in the report of *De Thoren v. A. G.* are incorrect.

CONNECTICUT.

(First paragraph of text.) *Budington v. Munson*, 33 Conn. 487; *Erwin v. English*, 61 Conn. 509; *State v. Schweitzer*, 57 Conn. 537, 538; *Hammick v. Bronson*, 5 Day, 293.

Marriage cannot be proven by reputation in criminal prosecutions for bigamy, incest, adultery, unlawful cohabitation or criminal conversation. *State v. Roswell*, 6 Conn. 446; *Hammick v. Bronson*, 5 Day, 293.

But *aliter* in prosecution for non-support. *State v. Schweitzer*, 57 Conn. 537, 538.

Evidence that the relation between a man and a woman is reputed to be adulterous, is not admissible against proof of a formal marriage. *Northrop v. Knowles*, 52 Conn. 523.

Marriage certificates are *prima facie* evidence of the facts therein stated. Gen. Stats., sec. 2788.

MASSACHUSETTS.

Means v. Welles, 12 Metc. 356; *Newburyport v. Boothbay* 9 Mass. 414; *Com. v. Holt*, 121 Mass. 61; *Com. v. Harley*, 14 Gray, 411; Massachusetts Pub. Stat., chap. 145, sec. 31.

Any one (not simply a member of the family), is a competent witness to prove repute. *Knower v. Wesson*, 13 Metc. 143.

When marriage is in issue on a writ of right, it may be shown by cohabitation and repute. *Means v. Welles*, 12 Metc. 356.

The repute may be in another country. *Com. v. Johnson*, 10 Allen, 196.

Marriage cannot be proven by reputation in criminal prosecutions for bigamy, incest, adultery, unlawful cohabitation or criminal conversation. *Com. v. Littlejohn*, 15 Mass. 163; *Com. v. Norcross*, 9 Mass. 492. But see Pub. Stat. 1882, chap. 145, sec. 31.

ARTICLE 54.

GROUNDS OF OPINION, WHEN DEEMED TO BE RELEVANT.

Whenever the opinion of any living person is deemed to be relevant, the grounds on which such opinion is based are also deemed to be relevant.

Illustration.

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

AMERICAN NOTE.

GENERAL.

Authorities.—Lawson on Expert and Opinion Evidence (2d ed.), p. 209 *et seq.*; 12 Am. & Eng. Encyclopædia of Law (2d ed.), p. 489; *Woodman v. Dana*, 52 Me. 9; *Steam Mill Co. v. Water Power Co.*, 78 Me. 274.

MASSACHUSETTS.

Sexton v. North Bridgewater, 116 Mass. 200; *Leslie v. Granite R. Co.*, 172 Mass. 468, 52 N. E. 542; *Hawkins v. Fall River*, 119 Mass. 94; *Dickenson v. Fitchburg*, 13 Gray, 555; *Keith v. Lathrop*, 10 Cush. 457; *Demeritt v. Randall*, 116 Mass. 331; *Emerson v. Lowell Gas Co.*, 6 Allen, 146.

This is true in case of experts. *Hawkins v. Fall River*, 119 Mass. 94; *Eidt v. Cutler*, 127 Mass. 522.

While an expert may perform experiments, they must be under the same conditions as those existing in the case in question. *Com. v. Piper*, 120 Mass. 185.

CHAPTER VI.*

CHARACTER, WHEN DEEMED TO BE RELEVANT AND
WHEN NOT.

ARTICLE 55.

CHARACTER GENERALLY IRRELEVANT.

THE fact that a person is of a particular character is deemed to be irrelevant to any inquiry respecting his conduct, except in the cases mentioned in this chapter.

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), secs. 54, 55; 5 Am. & Eng. Encyclopædia of Law (2 ed.), p. 850. *Dunham v. Rackliffe*, 71 Me. 345; *Thayer v. Boyle*, 30 Me. 475; *Dame v. Kenney*, 25 N. H. 318; *Boardman v. Woodman*, 47 N. H. 120; *Lander v. Seaver*, 32 Vt. 114, 124, 76 Am. Dec. 156; *Hampson v. Taylor*, 15 R. I. 83, 8 Atl. 331; *Wright v. McKee*, 37 Vt. 161; *Chase v. Maine Central R. R. Co.*, 77 Me. 62.

In actions for seduction and the like the woman's bad character as to chastity may be shown. *Sanborn v. Neilson*, 4 N. H. 501; *Mitchell v. Work*, 13 R. I. 645.

CONNECTICUT.

In civil proceedings, unless the character of the party be directly put in issue by the proceeding itself, evidence of his general character is not admissible. *Humphrey v. Humphrey*, 7 Conn. 118; *Bennett v. Hyde*, 6 Conn. 26.

Insanity cannot be proved by common reputation. *State v. Hoyt*, 47 Conn. 539.

* See note XXV.

To show that a book account, produced in an action of book debt, is not entitled to credit, evidence is not admissible that the party who made the charges and with whom the business relating to the account was transacted, is generally reputed to keep inaccurate, false and fraudulent accounts; and that the books produced are generally reputed to be of that character. *Roberts v. Ellsworth*, 11 Conn. 292.

In the trial of one for assault, the defendant's counsel having offered the testimony of citizens as to his law-abiding character, asked the defendant if he had ever been engaged in a quarrel or in any kind of trouble. Held, inadmissible. *State v. Ferguson*, 71 Conn. 227.

Except in prosecutions for rape or attempted rape, evidence is not admissible in support of the general character of a witness for truth, unless a direct attempt has been made to impeach it, or he is a stranger. *Rogers v. Moore*, 10 Conn. 16, 17.

It was, therefore, excluded, although there had been an attempt to prove the witness to have been privy to a fraud in the deed under which the party calling him claimed, and about which he testified. *Rogers v. Moore*, 10 Conn. 16, 18.

That the character for honesty of the parties to a conveyance is bad cannot be shown to prove it fraudulent. *Woodruff v. Whittlesey*, Kirb. 62.

On a prosecution for a secret assault, evidence as to the defendant's general character is not admissible to establish the charge. *Thompson v. Church*, 1 Root, 313.

Where the question arises whether threats of personal violence, made by one person to another, gave the latter reasonable grounds for apprehending such violence, and for using preventive measures, he may show that the former was a person of a quarrelsome character, provided this was known to him when he used such measures. *Sherwood v. Reed*, 35 Conn. 451.

In trespass for entering the plaintiff's house with intent to ravish his wife,—Held, that evidence that she was a lewd woman, was admissible in defense. *Davenport v. Russell*, 5 Day, 148.

On a petition for divorce, presumptive evidence of adultery on the part of the wife, who was the respondent, was introduced. Held, that evidence of her general fair character was not admissible in rebuttal. *Humphrey v. Humphrey*, 7 Conn. 118.

In an action of slander, for charging the plaintiff with adultery with C, a married woman, the defendant justified on the ground

that the charge was true, and introduced direct evidence to that effect, as well as other evidence to show that the conduct of the plaintiff and C, for a long time before the making of the charges, was grossly indecent towards each other. He then offered proof that the plaintiff, during such conduct, had declared that he preferred married women, because, if any consequences followed from his connection with them, their husbands would be responsible for them. It did not appear that the defendant knew of this remark before he made the charges in question. Held, that such proof did not tend to sustain the truth of the charges in respect to C, nor to show that the plaintiff's general character or reputation was bad; and was, therefore, inadmissible. *Gillis v. Peck*, 20 Conn. 231.

Evidence that reports were in circulation before the speaking of the slanderous words, that the plaintiff had committed the offense charged, is admissible, but only as evidence of general character, in mitigation of damages. *Treat v. Browning*, 4 Conn. 414.

In an action of libel for charging the plaintiff with specific acts of misconduct as a tax collector, he cannot be allowed to repel evidence introduced in justification, by proof that he has always borne the character of an honest man. *Stow v. Converse*, 3 Conn. 345.

On the trial of an action for a malicious prosecution, the plaintiff offered evidence as to the defendant's bad character for truth, then and at the time of the trial of the prosecution, before the defendant had been called as a witness. Held, inadmissible, although he might be allowed to show what, if any, evidence, as to the defendant's character in that respect, was given on the trial of the prosecution. *Goodrich v. Warner*, 21 Conn. 442.

In an action for slander, the character of the plaintiff is put in issue by the nature of the proceeding itself; and he may support it by proof, as to those points to which the slander was directed. *Bennett v. Hyde*, 6 Conn. 26.

In an action of libel, to support the truth of a charge that the plaintiff had set up an infidel club, the defendant offered evidence that the plaintiff belonged to a certain club which had the general character of being an infidel club. Held, inadmissible, as mere hearsay. *Stow v. Converse*, 4 Conn. 40, 41.

MASSACHUSETTS.

Lamagdelaine v. Trombly, 162 Mass. 339, 39 N. E. 38; *Boynton v. Kellogg*, 3 Mass. 189; *Atwood v. Dearborn*, 1 Allen, 483, 79 Am. Dec. 755; *Day v. Ross*, 154 Mass. 13; *Heywood v. Reed*, 4

Gray, 574; *McDonald v. Savoy*, 110 Mass. 49; *Com. v. Worcester*, 3 Pick. 462; *McCarty v. Leary*, 118 Mass. 509; *Clement v. Kimball*, 98 Mass. 535; *Leonard v. Allen*, 11 Cush. 241; *Tenney v. Tuttle*, 1 Allen, 185.

In malicious prosecution, the plaintiff's bad character is admissible on the issue of probable cause. *McIntyre v. Levering*, 148 Mass. 546.

The character of a witness for veracity may always be attacked and defended. *Fay v. Harlan*, 128 Mass. 244; *Com. v. Stevenson*, 127 Mass. 446; *Gertz v. Fitchburg R. R. Co.*, 137 Mass. 77.

ARTICLE 56.

EVIDENCE OF CHARACTER IN CRIMINAL CASES.

In criminal proceedings, the fact that the person accused has a good character, is deemed to be relevant; but the fact that he has a bad character is deemed to be irrelevant, unless it is itself a fact in issue, or unless evidence has been given that he has a good character, in which case evidence that he has a bad character is admissible.

A person charged with an offence and called as a witness in pursuance of the Criminal Evidence Act, 1898, may not be asked, and if asked may not be required to answer, any question tending to show that he has committed, or been convicted of, or been charged with any offence other than that whereof he is then charged,

or is of bad character,

unless

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged;¹ or

¹ See Article 11 and the concluding paragraphs of this article.

(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character,

or has given evidence of his own good character ;

or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor, or the witnesses for the prosecution ; or

(iii) he has given evidence against any other person charged with the same offence.²

When any person gives evidence of his good character other than his own sworn testimony, who—

Being on his trial for any felony not punishable with death, has been previously convicted of felony ;³

Or, who being upon his trial for any offence punishable under the Larceny Act, 1861, has been previously convicted of any felony, misdemeanour, or offence punishable upon summary conviction :⁴

Or who, being upon his trial for any offence against the Coinage Offences Act, 1861, or any former Act relating to the coin, has been previously convicted of any offence against any such Act.⁵

The prosecutor may, in answer to such evidence of good character, give evidence of any such previous conviction

² 61 & 62 Vict. c. 36, s. 1 (f).

³ 6 & 7 Will. IV. c. 111, referring to 7 & 8 Geo. IV. c. 28, s. 11. If "not punishable with death" means not so punishable at the time when 7 & 8 Geo. IV. c. 28 was passed (21 June, 1827), this narrows the effect of the article considerably.

⁴ 24 & 25 Vict. c. 96, s. 116.

⁵ 24 & 25 Vict. c. 99, s. 37.

before the jury return their verdict for the offence for which the offender is being tried.⁶

In this article the word "character" means reputation as distinguished from disposition, and, except as previously mentioned in this article, evidence may be given only of general reputation and not of particular acts by which reputation or disposition is shown.⁷

AMERICAN NOTE.

GENERAL.

Authorities.—3 Greenleaf on Evidence (15th ed.), sec. 25; 5 Am. & Eng. Encyclopædia of Law (2d ed.), p. 866 *et seq.*; *State v. Tozier*, 49 Me. 404.

Evidence of bad character.—*State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69; *State v. Ellwood*, 17 R. I. 763, 24 Atl. 782; *State v. Hull*, 18 R. I. 207, 26 Atl. 191, 20 L. R. A. 609.

General reputation, not particular acts.—*State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69.

A witness may not testify as to the disposition of the accused. *State v. Renton*, 15 N. H. 169.

CONNECTICUT.

In rape, evidence of the general character of the plaintiff respecting the subject-matter of the charge may be introduced by the defendant. *Seymour v. Merrills*, 1 Root, 459; *Brunson v. Lynde*, 1 Root, 354.

Whether the general character for truth of the complainant in a prosecution for rape, or attempted rape, may not always be shown in chief by the State, *quære*. *State v. De Wolf*, 8 Conn. 100.

Except in prosecutions for rape or attempted rape, evidence is not admissible in support of the general character of a witness for truth, unless a direct attempt has been made to impeach it, or he is a stranger. *Rogers v. Moore*, 10 Conn. 16, 17.

⁶ See each of the Acts above referred to.

⁷ *R. v. Rowton*, 1865, 1 L. & C. 520. *R. v. Turberfield*, 1864, 1 L. & C. 495, is a case in which the character of a prisoner became incidentally relevant to a certain limited extent.

If the complainant in a prosecution for an attempt to commit a rape be deaf and dumb, evidence that her general character for truth is good is admissible in chief, although no attempt at impeachment has been made; since she is in the situation of a stranger. *State v. De Wolf*, 8 Conn. 101.

General reputation, not particular acts.—*Betts v. Lockwood*, 8 Conn. 488, 489; *State v. Ferguson*, 71 Conn. 227.

MASSACHUSETTS.

Com. v. Webster, 5 Cush. 295, 324, 52 Am. Dec. 711; *Miller v. Curtis*, 158 Mass. 127, 35 Am. St. Rep. 469; *Com. v. Leonard*, 140 Mass. 473.

The character must be as to points which would tend to show that it was unlikely that the defendant committed the crime in question. *Com. v. Nagle*, 157 Mass. 554.

In a prosecution for adultery, evidence of the good character for chastity of the woman with whom the adultery was alleged to have been committed is admissible. *Com. v. Gray*, 129 Mass. 474.

Evidence of bad character.—*Com. v. Sacket*, 22 Pick. 394; *Com. v. Hardy*, 2 Mass. 303, 317; *Com. v. O'Brien*, 119 Mass. 345; *Rex v. Doaks*, Quincy, 90.

Evidence of good character.—(First paragraph of text.) *Com. v. Gazzolo*, 123 Mass. 220.

Good character may be shown in defense in a murder trial. *Com. v. Hardy*, 2 Mass. 303, 317; *Com. v. Webster*, 5 Cush. 296.

The rule that good character is not to be considered unless the jury are in doubt on the other evidence is no longer law. *Com. v. Leonard*, 140 Mass. 479.

General reputation, not particular acts.—Sustaining text: *Com. v. O'Brien*, 119 Mass. 342, 345, 20 Am. Rep. 325; *Com. v. Harris*, 131 Mass. 336. Compare *Com. v. Robinson*, Thacher Cr. Cas. 230.

ARTICLE 57.

CHARACTER AS AFFECTING DAMAGES.

In civil cases, the fact that a person's general reputation is bad, may it seems be given in evidence in reduction of damages; but evidence of rumours that his reputation was

bad, and evidence of particular facts showing that his disposition was bad, cannot be given in evidence.⁸

In actions for libel and slander in which the defendant does not by his defence assert the truth of the statement complained of, the defendant is not entitled on the trial to give evidence in chief with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless seven days at least before the he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence.⁹

AMERICAN NOTE.

GENERAL.

Authorities.—Ogden on Libel and Slander (Am. ed.), p. 305, note (a); 5 Am. & Eng. Encyclopædia of Law (2d ed.), p. 850 *et seq.*

This rule, in this country, at least, is restricted to actions for injury to character. The case cited by the author applies it to cases of slander and libel.

Evidence of good general moral character may be introduced in libel cases. *Sickra v. Small*, 87 Me. 493.

That reports were circulated, charging the plaintiff with the act imputed in the slanderous statement, cannot be shown. *Sickra v. Small*, 87 Me. 493.

CONNECTICUT.

In an action for fraud in the sale of the defendant's business as a physician, the declaration alleged that the defendant falsely represented his practice to be the regular allopathic practice. Held, that in proving that the defendant's practice was of a different and irregular kind, evidence of reputation was not admissible. *Bradbury v. Bardin*, 34 Conn. 452.

In an action by a physician for damages for injuries to the

⁸ *Scott v. Sampson*, 1882, 8 Q. B. D. 491, in which all the older cases are minutely examined in the judgment of Cave, J.

⁹ R. S. C., Order XXXVI., rule 37.

person, disabling him from practicing his profession, he proved the amount of his previous professional income. Held, that the defendant might show both that his practice was of an unlawful character, and that such was its reputation, as the value of a physician's practice depends much on its reputation in this particular. *Jacques v. Bridgeport Horse R. R. Co.*, 41 Conn. 67.

In an action for frightening the plaintiff's horse, and causing him to run away, whereby his market value was lessened,—Held, that the plaintiff could show how extensively it was known in the neighborhood that the horse had run away. *Clinton v. Howard*, 42 Conn. 310.

In an action of slander for imputing certain practices to the plaintiff, the defendant may show that the reputation of the plaintiff is disparaged by there having been reports in the neighborhood that he had been guilty of practices similar to those imputed to him. *Bailey v. Hyde*, 3 Conn. 466.

The defendant may show in mitigation of damages that it had become a matter of common and general report that the facts charged by the slanderous words were true, before he uttered them; both as showing that the plaintiff's reputation was not unsullied, and as evidence of the defendant's innocent intent. *Case v. Marks*, 20 Conn. 251, 252.

Where the charge was unchastity, and evidence of bad character was introduced in defense, the jury may properly be told that if they should find that the plaintiff was a virtuous female, and that her character had been destroyed by the slanders of the defendant and others, they may give liberal damages, but that if they should find that the plaintiff had so destroyed her character, by her own lewd and dissolute conduct, as to have sustained no injury from the words spoken, they may give only nominal damages. *Flint v. Clark*, 13 Conn. 369.

The jury are not bound to give nominal damages in all cases where it appears that the plaintiff's character for chastity was bad when and before the words were spoken, even though it may have been caused by her own misconduct. *Flint v. Clark*, 13 Conn. 368.

The defendant is allowed to introduce evidence of character, in mitigation of damages, to show the worth of the reputation which he has attacked; but if the plaintiff has suffered, not from his own fault, but from the slanders of others, she may be entitled to damages proportioned to the real worth of the character which she comes to vindicate. *Flint v. Clark*, 13 Conn. 369.

The plaintiff may give evidence in chief of his good character and need not wait until the defendant has adduced evidence of his bad character. *Bennett v. Hyde*, 6 Conn. 24.

Where the charge was that the defendant published of the plaintiff that he had set up and supported an infidel club, and seduced his early companions to join it, held, that evidence that a certain club, of which the plaintiff had been a member, had the general character of being an infidel club, was no justification, nor would such evidence be admissible in mitigation of damages. *Stow v. Converse*, 4 Conn. 41, 42.

MASSACHUSETTS.

Stone v. Varney, 7 Metc. 86, 39 Am. Dec. 762; *McIntyre v. Levering*, 148 Mass. 546; *Clark v. Brown*, 116 Mass. 504; *Howland v. Blake Mfg. Co.*, 156 Mass. 543, 568.

In suit for defamation, evidence to show bad character, so far as integrity and moral worth or the traits involved in the libel are concerned, is alone admissible. *Leonard v. Allen*, 11 Cush. 241.

Such evidence is admissible in a suit for malicious prosecution. *Bacon v. Towne*, 4 Cush. 217.

That reports were circulated charging the plaintiff with the act imputed in the slanderous statement, cannot be shown. *Mahoney v. Belford*, 132 Mass. 393.

Nor can they in malicious prosecution if the defendant did not know of the reports. *Lathrop v. Adams*, 133 Mass. 471.

General reputation, not particular acts.—The defendant is restricted to proof of general reputation. He cannot show specific wrongful acts. *McLaughlin v. Cowley*, 131 Mass. 70; *Miller v. Curtis*, 158 Mass. 127, 131.

PART II. ON PROOF.

CHAPTER VII.

FACTS PROVED OTHERWISE THAN BY EVIDENCE—JUDICIAL NOTICE.

ARTICLE 58.*

OF WHAT FACTS THE COURT TAKES JUDICIAL NOTICE.

It is the duty of all judges to take judicial notice of the following facts:—

(1) All unwritten laws, rules, and principles having the force of law administered by any Court sitting under the authority of Her Majesty and her successors in England or Ireland, whatever may be the nature of the jurisdiction thereof.¹

(2) All public Acts of Parliament,¹ and all Acts of Parliament whatever, passed since February 4, 1851, unless the contrary is expressly provided in any such Act.²

(3) The general course of proceeding and privileges of Parliament and of each House thereof, and the date and

* See note XXVI.

¹ 1 Ph. Ev. 460-1; Taylor, s. 5; and see 36 & 37 Vict. c. 66 (Judicature Act of 1873), s. 25.

² 52 & 53 Vict. c. 63 (The Interpretation Act, 1889), s. 9.

place of their sittings, but not transactions in their journals.³

(4) All general customs which have been held to have the force of law in any division of the High Court of Justice or by any of the superior courts of law or equity, and all customs which have been duly certified to and recorded in any such court.⁴

(5) The course of proceeding and all rules of practice in force in the Supreme Court of Justice. Courts of a limited or inferior jurisdiction take judicial notice of their own course of procedure and rules of practice, but not of those of other courts of the same kind, nor does the Supreme Court of Justice take judicial notice of the course of procedure and rules of practice of such Courts.⁵

(6) The accession and [*semble*] the sign manual of Her Majesty and her successors.⁶

(7) The existence and title of every State and Sovereign recognised by Her Majesty and her successors.⁷

(8) The accession to office, names, titles, functions, and when attached to any decree, order, certificate, or other

³ 1 Ph. Ev. 460; Taylor, s. 5; but see 8 & 9 Vict. c. 113, s. 3, as to journals of the Houses of Parliament.

⁴ The old rule was that each Court took notice of customs held by or certified to it to have the force of law. It is submitted that the effect of the Judicature Act, which fuses all the Courts together, must be to produce the result stated in the text. As to the old law, see *Piper v. Chappell*, 1845, 14 M. & W. 649-50. *Ex parte Powell*, *In re Matthews*, 1875, 1 Ch. Div. 505-7, contains some remarks by Lord Justice Mellish as to proving customs till they come by degrees to be judicially noticed.

⁵ 1 Ph. Ev. 462-3; Taylor, s. 20.

⁶ 1 Ph. Ev. 458; Taylor, ss. 18, 14.

⁷ 1 Ph. Ev. 460; Taylor, s. 4.

judicial or official documents, the signatures of all the judges of the Supreme Court of Justice.⁸

(9) The Great Seal, the Privy Seal, the seals of the Superior Courts of Justice,⁹ and all seals which any Court is authorised to use by any Act of Parliament,¹⁰ certain other seals mentioned in Acts of Parliament,¹⁰ the seal of the Corporation of London,¹¹ and the seal of any notary public in the Queen's dominions.¹²

(10) The extent of the territories under the dominion of Her Majesty and her successors; the territorial and political divisions of England and Ireland, but not their geographical position or the situation of particular places; the commencement, continuance, and termination of war between Her Majesty and any other Sovereign; and all other public matters directly concerning the general government of Her Majesty's dominions.¹³

(11) The ordinary course of nature, natural and artificial divisions of time, the meaning of English words.¹⁴

(12) All other matters which they are directed by any statute to notice.

⁸ 1 Ph. 462; Taylor, s. 14; and as to latter part, 8 & 9 Vict. c. 113, s. 2, as modified by 36 & 37 Vict. c. 66, s. 76 (Judicature Act of 1873).

⁹ The Judicature Acts confer no seal on the Supreme or High Court or its divisions.

¹⁰ *Doe v. Edwards*, 1839, 9 A. & E. 555. See a list in Taylor, s. 6.

¹¹ 1 Ph. Ev. 464; Taylor, s. 6.

¹² *Cole v. Sherard*, 1855, 11 Ex. 482. As to foreign notaries, see *Earl's Trust*, 1858, 4 K. & J. 300.

¹³ 1 Ph. Ev. 466, 460, 458; and Taylor, s. 17.

¹⁴ 1 Ph. Ev. 465-6; Taylor, s. 16.

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), sec. 4 *et seq.*; 17 Am. & Eng. Encyclopædia of Law (2d ed.), p. 892 *et seq.*

The instances of facts taken judicial notice of can be multiplied indefinitely. A few illustrative ones only appear in the note. Reference is made for others to the authorities cited here and to the various digests.

Courts will take judicial notice of the geographical divisions of the State. *Harney v. Wayne*, 72 Me. 430; *Bellows v. Elliott*, 12 Vt. 569; *Ham v. Ham*, 39 Me. 266; *State v. Jackson*, 39 Me. 291; *Goodwin v. Appleton*, 22 Me. 453. And of the boundaries of the State, as claimed by it. *State v. Dunwell*, 3 R. I. 127. But not of the limits of a place which is not a public corporation. *Blandin v. Sargent*, 33 N. H. 239, 66 Am. Dec. 720. And of the geographical features of the State, as its large lakes, rivers, and mountains. *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420. But not of the fact that gin and turpentine are "inflammable liquids," within the terms of an insurance policy. *Mosley v. Vt. Mut. Fire Ins. Co.*, 55 Vt. 142.

Courts take judicial notice of the fact that vacant buildings are more exposed to fire than those occupied. *White v. Phoenix Ins. Co.*, 83 Me. 279, 22 Atl. 167.

CONNECTICUT.

Judicial notice is superior to proof as a means of proving facts. *State v. Main*, 69 Conn. 136.

The court will interpret language by the aid of those facts which pertain to that common and general fund of knowledge and information which belongs to the domain of things of which all courts are bound to take judicial notice. *Robinson v. Clapp*, 65 Conn. 395.

Our courts take judicial notice of the seal of a foreign government. *Griswold v. Pitcairn*, 2 Conn. 89.

Under General Statutes, section 1087, the courts take judicial notice of public and private acts. *Donovan v. Hartford St. Ry. Co.*, 65 Conn. 214.

The court need not take judicial notice of a statute for the purpose of sustaining an action which might have been brought upon that statute but was not. *Austin v. Barrows*, 41 Conn. 301.

Courts take judicial notice of the date of the rising of the general assembly. *Perkins v. Perkins*, 7 Conn. 564. And of the local divisions of the State into towns and counties. *State v. Powers*, 25 Conn. 50. And of the laws governing them and of the jurisdiction of inferior courts whose judgments they revise. *Clapp v. Hartford*, 35 Conn. 74. And of railroad lines, mail facilities, and telegraph communication. *Morgan v. Farrel*, 58 Conn. 428. And of the hours of sunrise and sunset, but an almanac may be read on the trial to refresh the memory of the court and jury. *State v. Morris*, 47 Conn. 180. And that some colored paper is dyed with poisonous substances and some is not. *O'Keefe v. National, etc., Co.*, 66 Conn. 45. And that peach "yellows" exists and is a serious disease. *State v. Main*, 69 Conn. 135. And that blasting with dynamite is intrinsically dangerous. *Norwalk Gas-Light Co. v. Norwalk*, 63 Conn. 528. And that the term "policy playing" was in current use at the time a certain ordinance was passed. *State v. Carpenter*, 60 Conn. 102.

It is no error for a judge to state, in respect to a record of his own court, that if it becomes important he can take judicial notice of it. *City of Hartford v. N. Y. & N. E. R. R. Co.*, 59 Conn. 253.

A copy of a record of a proceeding in a foreign Court of Admiralty, purporting to be certified by the deputy registrar, under the seal of the court, is sufficiently authenticated. *Thompson v. Stewart*, 3 Conn. 180.

The judicial decisions of other States are judicially noticed by our courts, under the statute, and, when uncontradicted, are sufficient evidence of the law in such States. *Hale v. New Jersey Steam Navigation Co.*, 15 Conn. 550.

It is a sufficient authentication of a foreign judgment, if there is attached to the record of it the national seal of the sovereignty where it was rendered, although there is no certificate of any nature annexed to the record; as the seal proves itself, and our courts are bound to take judicial notice of it, and will presume that it was properly affixed. *Griswold v. Pitcairn*, 2 Conn. 89.

A commission to a militia officer was issued by "Chauncey F. Cleveland, captain-general and commander-in-chief in and over the State of Connecticut." Held, that these words of description were sufficient, without adding also that he was governor of the State. *Monson v. Hunt*, 17 Conn. 570.

The commission of a militia officer issued by the governor, under the seal of the State, is sufficient proof of the officer's authority as

such, unless, perhaps, it can be shown that it was granted without authority or by mistake. *Monson v. Hunt*, 17 Conn. 571.

The court will take judicial notice of the existence and terms of the charters of charitable corporations. *Woodruff v. Marsh*, 63 Conn. 141.

Courts will take judicial notice of the fact that machinery, if subjected to only ordinary wear, will, if taken back by the vendor, necessarily be greatly depreciated in its market value, having to be sold again, if at all, as second-hand machinery. *Beach's Appeal*, 58 Conn. 477.

The court must take judicial notice of the certainty that the poor will always be among men. *Goodrich's Appeal*, 57 Conn. 284.

In a suit to restrain infringement of a trademark, the defendant contended that the word "Hygeia" had acquired the well-defined secondary meaning of "healthful" or "health-giving," and as such was one of those common descriptive words that could not be lawfully appropriated as a trademark. Held, that the question thus presented was to be determined by the court upon its judicial knowledge, aided by reference to standard authorities, or by evidence, or by both. *Hygeia Distilled Water Co. v. Hygeia Ice Co.*, 70 Conn. 516.

A court may take judicial notice, as of an historical fact, of the time when a trunk railroad within its jurisdiction was opened for public use. *Knowlton v. N. Y., N. H. & H. R. R. Co.*, 72 Conn. 188.

Courts are to take judicial notice of the Special Acts of the State. Gen Stats., sec. 1087.

MASSACHUSETTS.

Courts will take judicial notice of an English statute concerning prize causes. *Hooker v. Pagan*, 7 Dane Abr. 645. So of the Constitution of another State. *Buffum v. Stimpson*, 5 Allen, 591. So of the judges of lower courts. *Com. v. Jeffts*, 14 Gray, 19. So of the various counties. *Com. v. Desmond*, 103 Mass. 445. So of the jurisdiction of a court. *Com. v. Desmond*, 103 Mass. 445. So of the navigability of a river. *Com. v. King*, 150 Mass. 221, 22 N. E. 905, 5 L. R. A. 536. So of the fact that tobacco and cigars sold by a tobacconist are not drugs. *Com. v. Marzynski*, 149 Mass. 68, 21 N. E. 228. So, by statute, of the character of certain lotteries. Acts of 1895, chap. 419, sec. 2.

ARTICLE 59.

AS TO PROOF OF SUCH FACTS.

No evidence of any fact of which the Court will take judicial notice need be given by the party alleging its existence; but the judge, upon being called upon to take judicial notice thereof, may, if he is unacquainted with such fact, refer to any person or to any document or book of reference for his satisfaction in relation thereto, or may refuse to take judicial notice thereof unless and until the party calling upon him to take such notice produces any such document or book of reference.¹⁵

AMERICAN NOTE.

GENERAL.

Authorities.—McKelvey on Evidence, p. 36; 1 Taylor on Evidence (Chamberlayne's 9th ed.), p. 2139; *Wagner's Case*, 61 Me. 178.

Evidence is inadmissible of that of which courts take judicial notice. *White v. Phœnix Ins. Co.*, 83 Me. 279, 22 Atl. 167.

CONNECTICUT.

State v. Morris, 47 Conn. 179.

MASSACHUSETTS.

Evidence is inadmissible of that of which courts take judicial notice. *Com. v. Marzynski*, 149 Mass. 72, 21 N. E. 228.

¹⁵ Taylor (from Greenleaf), s. 21. *E.g.* a judge will refer in case of need to an almanac, or to a printed copy of the statutes, or write to the Foreign Office, to know whether a State has been recognised.

ARTICLE 60.

EVIDENCE NEED NOT BE GIVEN OF FACTS ADMITTED.

No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which they have admitted before the hearing and with reference thereto, or by their pleadings.¹⁶ Provided that in a trial for felony the prisoner can make no admissions so as to dispense with proof, though a confession may be proved as against him, subject to the rules stated in Articles 21-24.¹⁷

AMERICAN NOTE.

GENERAL.

Authorities.— 11 Am. & Eng. Encyclopædia of Law (2d ed.), p. 488; Gould on Pleading, chap. 3, sec. 168.

CONNECTICUT.

Gulliver v. Fowler, 64 Conn. 556, 566.

A demurrer is not an admission if an issue of fact is subsequently joined. *State's Attorney v. Branford*, 59 Conn. 402, 414. See also *Tyler v. Waddingham*, 58 Conn. 389.

¹⁶ R. S. C., O. XXXII. The fact that a document is admitted does not make it relevant and is not equivalent to putting it in evidence, per James, L. J., in *Watson v. Rodwell*, 1878, 11 Ch. Div. at p. 150.

¹⁷ 1 Ph. Ev. 391, n. 6. In *R. v. Thornhill*, 1838, 8 C. & P., Lord Abinger acted upon this rule in a trial for perjury.

CHAPTER VIII.

OF ORAL EVIDENCE.

ARTICLE 61.

PROOF OF FACTS BY ORAL EVIDENCE.

ALL facts may be proved by oral evidence subject to the provisions as to the proof of documents contained in Chapters IX., X., XI., and XII.

ARTICLE 62.*

ORAL EVIDENCE MUST BE DIRECT.

Oral evidence must in all cases whatever be direct; that is to say—

If it refers to a fact alleged to have been seen, it must be the evidence of a witness who says he saw it;

If it refers to a fact alleged to have been heard, it must be the evidence of a witness who says he heard it;

If it refers to a fact alleged to have been perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

* See Note XXVII.

If it refers to an opinion, or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

AMERICAN NOTE.

GENERAL.

Authorities.—12 Am. & Eng. Encyclopædia of Law (2d ed.), p. 488; also vol. 11, p. 536; *Rea v. Harrington*, 58 Vt. 181.

A witness may give the impression if gained from facts personally perceived. *Humphries v. Parker*, 52 Me. 502; *Leach v. Bincrofts*, 61 N. H. 411; *Whitman v. Morey*, 63 N. H. 448, 457; *Fiske v. Gowing*, 61 N. H. 431; *State v. Ward*, 61 Vt. 153. But not otherwise. *Kingsbury v. Moses*, 45 N. H. 222.

Objects may be shown to the jury. *State v. Ward*, 61 Vt. 153.

By statute, generally, the jury may, by order of court, be taken to view property in controversy. 1 Thompson on Trials, sec. 882, p. 168.

CONNECTICUT.

A witness may probably be ordered to write his name in court where his signature is denied. *Smith v. King*, 62 Conn. 521.

The property in dispute may be inspected by the trier. *McGar v. Bristol*, 71 Conn. 652.

The court, in its discretion, may prevent the exhibition to the jury of what would be indecent or offensive. *Knowles v. Crampton*, 55 Conn. 336.

Photographs may be admissible evidence. *Dyson v. N. Y., etc., R. R. Co.*, 57 Conn. 9; *State v. Griswold*, 67 Conn. 290.

A photograph is secondary evidence. To admit it without proof of its correctness is error. The testimony of the photographer is not essential. That of any one with knowledge of the fact of its correctness is sufficient. *McGar v. Bristol*, 71 Conn. 655; *Cunningham v. Fair Haven & Westville R. R. Co.*, 72 Conn. 251.

Declarations may be proved by the testimony of any competent witnesses who heard them, as well as by the declarant himself; although he be a competent witness, and may be had. *Wilcox v. Green*, 28 Conn. 574.

MASSACHUSETTS.

A person may be exhibited to the jury. *Com. v. Emmons*, 98 Mass. 6.

A photograph may be introduced in evidence. *Com. v. Robertson*, 162 Mass. 90; *Gilbert v. West End R. R. Co.*, 160 Mass. 403.

The preliminary question of whether it is a correct representation is for the trial court and will not be reviewed. *Van Houten v. Morse*, 162 Mass. 414, 422, 44 Am. St. Rep. 373.

In Massachusetts, by statute, the jury may, by order of court, be taken to view property in controversy. Pub. Stats., chap. 170, sec. 43.

CHAPTER IX.

*OF DOCUMENTARY EVIDENCE—PRIMARY AND SECONDARY,
AND ATTESTED DOCUMENTS.*

ARTICLE 63.

PROOF OF CONTENTS OF DOCUMENTS.

THE contents of documents may be proved either by primary or by secondary evidence.

ARTICLE 64.

PRIMARY EVIDENCE.

Primary evidence means the document itself produced for the inspection of the Court, accompanied by the production of an attesting witness in cases in which an attesting witness must be called under the provisions of Articles 66 and 67; or an admission of its contents proved to have been made by a person whose admissions are relevant under Articles 15-20.¹

Where a document is executed in several parts, each part is primary evidence of the document:

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties

¹ *Slatterie v. Pooley*, 1840, 6 M. & W. 664.

only, each counterpart is primary evidence as against the parties executing it.²

Where a number of documents are all made by printing, lithography, or photography, or any other process of such a nature as in itself to secure uniformity in the copies, each is primary evidence of the contents of the rest;³ but where they are all copies of a common original, no one of them is primary evidence of the contents of the original.⁴

AMERICAN NOTE.

GENERAL.

Authorities.—Wharton on Evidence, secs. 92, 1091, 1092; 1 Greenleaf on Evidence (15th ed.), secs. 96, 203.

Admissions.—The contents of an instrument may be proved by admissions. *Blackington v. Rockland*, 66 Me. 332.

CONNECTICUT.

(First paragraph of text.) *Morey v. Hoyt*, 62 Conn. 542, 556, 557, 26 Atl. 127 (quoting this article with approval); *Edgerton v. Edgerton*, 8 Conn. 6; *Davis v. Kingsley*, 13 Conn. 285.

The recorded vote of the directors of a corporation is the only proper evidence of their acts. If it has been lost, secondary evidence may be introduced. *Hurd v. Hotchkiss*, 72 Conn. 480.

An executed contract, signed by one party only, is admissible in evidence against the party not signing in a suit by a stranger. *Watson v. New Milford*, 72 Conn. 566.

A paper purporting to be signed by a party is not admissible against him without some proof of the genuineness of the signature. *Neil v. Miller*, 2 Root, 117; *Canfield v. Squire*, 2 Root, 300.

² *Roe d. West v. Davis*, 1806, 7 Ea. 362.

³ *R. v. Watson*, 1817, 2 Star. 129. This case was decided long before the invention of photography; but the judgments delivered by the Court (Ellenborough, C. J., and Abbott, Bayley, and Holroyd, JJ.) establish the principle stated in the text.

⁴ *Nodin v. Murray*, 1812, 3 Camp. 227.

MASSACHUSETTS.

Admissions.—The contents of an instrument may be proved by admissions. They are primary evidence. *Loomis v. Wadhams*, 8 Gray, 557; *Smith v. Palmer*, 6 Cush. 513.

Telegrams.—The message received has been held primary evidence of that sent. *Nickerson v. Spindell*, 164 Mass. 28.

ARTICLE 65.

PROOF OF DOCUMENTS BY PRIMARY EVIDENCE.

The contents of documents must, except in the cases mentioned in Article 71, be proved by primary evidence: and in the cases mentioned in Article 66 by calling an attesting witness.

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), sec. 82 *et seq.*; McKelvey on Evidence, p. 342 *et seq.*

CONNECTICUT.

Sustaining text: *Kelsey v. Hanmer*, 18 Conn. 317; *Waller v. Eleventh Sch. Dist.*, 22 Conn. 333; *Elwell v. Mersick*, 50 Conn. 276; *Richards v. Stewart*, 2 Day, 328; *Hurd v. Hotchkiss*, 72 Conn. 480.

MASSACHUSETTS.

Topping v. Bickford, 4 Allen, 120; *Binney v. Russell*, 109 Mass. 55; *Amherst Bank v. Conkey*, 4 Metc. 459.

ARTICLE 66.*

PROOF OF EXECUTION OF DOCUMENT REQUIRED BY LAW
TO BE ATTESTED.

If a document is required by law to be attested, it may not be used as evidence (except in the cases mentioned or

* See Note XXVIII.

referred to in the next article) if there be an attesting witness alive, sane, and subject to the process of the Court, until one attesting witness at least has been called for the purpose of proving its execution.

If it be shown that no such attesting witness is alive or can be found, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

The rule extends to cases in which—

the document has been burnt⁵ or cancelled;⁶

the subscribing witness is blind;⁷

the person by whom the document was executed is prepared to testify to his own execution of it;⁸

the person seeking to prove the document is prepared to prove an admission of its execution by the person who executed it, even if he is a party to the cause,⁹ unless such admission be made for the purpose of, or has reference to, the cause.

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), sec. 569 *et seq.*; McKelvey on Evidence, p. 351 *et seq.*; 3 Taylor on Evidence (American edition of 1897), p. 1229 *et seq.*

(First paragraph of text.) *Foye v. Leighton*, 24 N. H. 29; *Woodman v. Segar*, 25 Me. 90; *Harding v. Cragie*, 8 Vt. 501; *Whittemore v. Brooks*, 1 Me. 57; *Gage v. Wilson*, 17 Me. 378.

⁵ *Gillies v. Smither*, 1819, 2 Star. R. 528.

⁶ *Breton v. Cope*, 1791, Pea. R. 43.

⁷ *Cronk v. Frith*, 1839, 9 C. & P. 197.

⁸ *R. v. Harringworth*, 1815, 4 M. & S. at p. 353.

⁹ *Call v. Dunning*, 1803, 4 Ea. 53. See, too, *Whyman v. Garth*, 1853, 8 Ex. 803; *Randall v. Lynch*, 1810, 2 Camp. 357.

Lost document.—If a document is lost, the rule is the same as that stated in the text with reference to burnt documents. *Kimball v. Morrell*, 4 Me. 368; *Wells v. Jackson Iron Co.*, 48 N. H. 491.

Witness not found.—If no competent attesting witness can be found, signatures may be proved. *Woodman v. Segar*, 25 Me. 90.

Proof of handwriting.—Maine Rev. Stat., chap. 73, sec. 19; Vermont Stat., sec. 2224 *et seq.*

In some States it is enough to prove the handwriting of the party alone. *Jones v. Roberts*, 65 Me. 273. Or of one witness. McKelvey on Evidence, p. 353.

One witness enough.—*Melcher v. Flanders*, 40 N. H. 139.

Admissions.—(Last paragraph of text.) *Kenney v. Flynn*, 2 R. I. 319.

CONNECTICUT.

The testimony to the execution of a deed of one of two subscribing witnesses makes *prima facie* proof of its execution. *O'Sullivan v. Overton*, 56 Conn. 105, 106.

Lost document.—If a document is lost, the rule is the same as though it had been burnt. *Kelsey v. Hanmer*, 18 Conn. 311.

Absence of witness.—Whether the absence from the State of the attesting witnesses of a bond is sufficient to admit proof of their handwriting, *quære*. *Hempstead v. Bird*, 2 Day, 293.

The plaintiff, being obliged to prove the execution of a written instrument, attested by a subscribing witness, produced the witness, had him sworn, and then stated that he was incompetent from interest, but that he would examine him if the other side would consent. No reply being made to this offer, the witness was dismissed, and the execution otherwise proved without objection. Held, that no objection to this secondary evidence could be subsequently made after all the witnesses have been dismissed; as the right to object was to be considered as waived in the absence of any satisfactory explanation. *Nichols v. Hayes*, 13 Conn. 163.

The mere fact that a person signed a paper as an attesting witness does not, as a matter of law, imply any knowledge on his part of the contents of the instrument. *Lapenta v. Lettieri*, 72 Conn. 377.

Where the attesting witnesses of a will are called to testify to the testator's capacity their testimony is not entitled to special consideration by reason of the mere fact that they are attesting witnesses. Its value must depend, as in the case of all other witnesses, upon their opportunity for observation of the testator. *Crandall's Appeal*, 63 Conn. 368.

MASSACHUSETTS.

The rules of this article are not abrogated by statutes making parties competent witnesses. *Brigham v. Palmer*, 3 Allen, 450.

(First paragraph of text.) *Brigham v. Palmer*, 3 Allen, 450; *Barry v. Ryan*, 4 Gray, 523.

Other competent evidence is admissible if all the attesting witnesses are dead, incompetent, or beyond the reach of process. *Homer v. Wallis*, 11 Mass. 309; *Valentine v. Piper*, 22 Pick. 85; *Haynes v. Rutter*, 24 Pick. 242; *Amherst Bank v. Root*, 2 Metc. 522; *Packard v. Dunsmore*, 11 Cush. 282; *Tyng v. B. & M. R. R. Co.*, 12 Cush. 277; *Brigham v. Palmer*, 3 Allen, 450.

So if the attesting witness fail to prove the document. *Whitaker v. Salisbury*, 15 Pick. 534. See also *Russell v. Coffin*, 8 Pick. 143; *Robinson v. Brennan*, 115 Mass. 582.

In a suit for fraud, in giving an invalid deed, the document may be proved without calling the attesting witnesses. *Skinner v. Brigham*, 126 Mass. 132.

One witness enough.—*White v. Wood*, 8 Cush. 413; *Gelott v. Goodspeed*, 8 Cush. 411.

The court, in its discretion, may call for the testimony of all the attesting witnesses. *Burke v. Miller*, 7 Cush. 547. See also *Clark v. Houghton*, 12 Gray, 38.

Absent witness.—The signature of an attesting witness, who is absent from the State, may be proved in the same way as though dead. *Trustees of Charities v. Connolly*, 157 Mass. 272.

Proof of handwriting.—Sustaining text: Massachusetts Pub. Stats., chap. 120, secs. 8, 10.

Party prepared to testify to execution.—Sustaining text: *Barry v. Ryan*, 4 Gray, 523.

Admissions.—*Blake v. Sawin*, 10 Allen, 340.

ARTICLE 67.*

CASES IN WHICH ATTESTING WITNESS NEED NOT BE CALLED.

In the following cases, and in the case mentioned in Article 88, but in no others, a person seeking to prove the

* See Note XXVIII.

execution of a document required by law to be attested is not bound to call for that purpose either the party who executed the deed or any attesting witness, or to prove the handwriting of any such party or attesting witness—

(1) When he is entitled to give secondary evidence of the contents of the document under Article 71 (a);¹⁰

(2) When his opponent produces it when called upon and claims an interest under it in reference to the subject-matter of the suit;¹¹

(3) When the person against whom the document is sought to be proved is a public officer bound by law to procure its due execution, who has dealt with it as a document duly executed.¹²

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), secs. 570–575; 11 Am. & Eng. Encyclopædia of Law (2d ed.), p. 586 *et seq.*

Where a document comes in incidentally in a suit between strangers, the attesting witnesses need not be called. *Ayers v. Hewitt*, 19 Me. 281, 285; *Curtis v. Belknap*, 21 Vt. 433.

Recorded instruments.—In some States recorded instruments may be proved without calling the subscribing witnesses. Maine Rev. Stat., chap. 82, sec. 110; *Knox v. Silloway*, 1 Fairf. (Me.) 201.

¹⁰ *Cooke v. Tamswell*, 1818, 8 Tau. 450; *Poole v. Warren*, 1838, 8 A. & E. 582.

¹¹ *Pearce v. Hooper*, 1810, 3 Tau. 60; *Rearden v. Minter*, 1843, 5 M. & G. 204. As to the sort of interest necessary to bring a case within this exception, see *Collins v. Bayntun*, 1841, 1 Q. B. 118.

¹² *Plumer v. Briscoe*, 1847, 11 Q. B. 46. *Bailey v. Bidwell*, 1844, 13 M. & W. 73, would perhaps justify a slight enlargement of the exception, but the circumstances of the case were very peculiar. Mr. Taylor (ss. 1852–3) considers it doubtful whether the rule extends to instruments executed by corporations, or to deeds enrolled under the provisions of any Act of Parliament, but his authorities hardly seem to support his view; at all events, as to deeds by corporations.

CONNECTICUT.

Recorded instruments.—In some States recorded instruments may be proved without calling the subscribing witnesses. *Kelsey v. Hammer*, 18 Conn. 311, 318.

MASSACHUSETTS.

The testimony of attesting witnesses is, probably, not necessary where the document is offered collaterally in a proceeding affecting only strangers to it. *Com. v. Castles*, 9 Gray, 121; *Skinner v. Brigham*, 126 Mass. 132.

Interest claimed by opponent.—Sustaining text: *McGregor v. Wait*, 10 Gray, 72, 69 Am. Dec. 305; *Adams v. O'Connor*, 100 Mass. 515.

Recorded instruments.—In some States recorded instruments may be proved without calling the subscribing witnesses. *Gragg v. Learned*, 109 Mass. 167; *Burghart v. Turner*, 12 Pick. 534, 538; *Scanlon v. Wright*, 13 Pick. 523, 527, 25 Am. Dec. 344.

ARTICLE 68.

PROOF WHEN ATTESTING WITNESS DENIES THE EXECUTION.

If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.¹³

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), sec. 572; 11 Am. & Eng. Encyclopædia of Law (2d ed.), p. 598; *Frost v. Deering*, 21 Me. 156.

MASSACHUSETTS.

Whitaker v. Salisbury, 15 Pick. 534, 544; *Thomas v. Le Baron*, 8 Metc. 355; *Tompson v. Fisher*, 123 Mass. 559.

¹³ "Where an attesting witness has denied all knowledge of the matter, the case stands as if there were no attesting witness;" *Talbot v. Hodson*, 1816, 7 Tau. 251, 254.

ARTICLE 69.

PROOF OF DOCUMENT NOT REQUIRED BY LAW TO BE
ATTESTED.

An attested document not required by law to be attested may in all cases whatever, civil or criminal, be proved as if it was unattested.¹⁴

AMERICAN NOTE.

GENERAL.

Authorities.—3 Taylor on Evidence (Chamberlayne's 9th ed.), p. 1229⁶ *et seq.*; 11 Am. & Eng. Encyclopædia of Law (2d ed.), p. 593.

The common-law rule is otherwise. See last authority above.

CONNECTICUT.

The common law is otherwise. If a note be attested by witnesses, the genuineness of the signature cannot be proved by a comparison of hands, without calling them. *Law v. Atwater*, 2 Root, 72; *Knap v. Sacket*, 1 Root, 502

MASSACHUSETTS.

Contra to text: *Tompson v. Fisher*, 123 Mass. 559; *Homer v. Wallis*, 11 Mass. 309.

ARTICLE 70.

SECONDARY EVIDENCE.

Secondary evidence means—

(1) Examined copies, exemplifications, office copies, and certified copies:¹⁵

¹⁴ 28 & 29 Vict. c. 18, ss. 1, 7; re-enacting 17 & 18 Vict. c. 125, s. 26, now repealed.

¹⁵ See Chapter X.

(2) Other copies made from the original and proved to be correct:

(3) Counterparts of documents as against the parties who did not execute them:¹⁶

(4) Oral accounts of the contents of a document given by some person who has himself seen it.

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), sec. 84 *et seq.*; 11 Am. & Eng. Encyclopædia of Law (2d ed.), pp. 535, 583 *et seq.*

In giving testimony, a witness must recollect the substance of the document. *Camden v. Belgrade*, 78 Me. 204.

CONNECTICUT.

The correctness of a copy may be proved by the testimony of one who compared it with a paper read as the original by another. *Lynde v. Judd*, 3 Day, 500.

A copy of a copy may be competent evidence. It is not, however, if the original is in existence. *Cameron v. Peck*, 37 Conn. 555, 558.

ARTICLE 71.

CASES IN WHICH SECONDARY EVIDENCE RELATING TO DOCUMENTS MAY BE GIVEN.

Secondary evidence may be given of the contents of a document in the following cases—

(a) When the original is shown or appears to be in the possession or power of the adverse party,

and when, after the notice mentioned in Article 72, he does not produce it;¹⁷

¹⁶ *Munn v. Godbold*, 1825, 3 Bing. 292.

¹⁷ *R. v. Watson*, 1788, 2 T. R. at p. 201. *Entick v. Carrington*, 1765, 19 S. T. at p. 1073, is cited by Mr. Phillips as an authority for

(b) When the original is shown or appears to be in the possession or power of a stranger not legally bound to produce it, and who refuses to produce it after being served with a *subpœna duces tecum*, or after having been sworn as a witness and asked for the document and having admitted that it is in court;¹⁸

(c) When the original has been destroyed or lost, and proper search has been made for it;¹⁹

(d) When the original is of such a nature as not to be easily movable,²⁰ or is in a country from which it is not permitted to be removed;²¹

(e) When the original is a public document;²²

(f) When the document is an entry in a banker's book, proof of which is admissible under Article 36.

(g) When the original is a document for the proof of which special provision is made by any Act of Parliament, or any law in force for the time being;²² or

(h) When the originals consist of numerous documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collec-

this proposition. I do not think it supports it, but it shows the necessity for the rule, as at common law no power existed to compel the production of documents.

¹⁸ *Miles v. Oddy*, 1834, 6 C. & P. at p. 732; *Marston v. Downes*, 1834, 1 A. & E. 31.

¹⁹ 1 Ph. Ev. s. 452; 2 Ph. Ev. 281; Taylor (from Greenleaf), s. 429. The loss may be proved by an admission of the party or his attorney; *R. v. Haworth*, 1830, 4 C. & P. 254.

²⁰ *Mortimer v. McCallan*, 1840, 6 M. & W. at pp. 67, 68 (referring to the case of a libel written on a wall); *Bruce v. Nicolopulo*, 1855, 11 Ex. 133 (the case of a placard posted on a wall).

²¹ *Alivon v. Furnival*, 1834, 1 C. M. & R. 277, 291-2.

²² See Chapter X.

tion: provided that that result is capable of being ascertained by calculation.²³

Subject to the provisions hereinafter contained any secondary evidence of a document is admissible.²⁴

In case (f) the copies cannot be received as evidence unless it be first proved that the book in which the entries copied were made was at the time of making one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody and control of the bank, which proof may be given orally or by affidavit by a partner or officer of the bank, and that the copy has been examined with the original entry and is correct, which proof must be given by some person who has examined the copy with the original entry and may be given orally or by affidavit.²⁵

In case (h) evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

Questions as to the existence of facts rendering secondary evidence of the contents of documents admissible are to be decided by the judge, unless in deciding such a question the judge would in effect decide the matter in issue.

²³ *Roberts v. Dowen*, 1791, 1 Peake, 116; *Meyer v. Sefton*, 1817, 2 Star. at p. 276. The books, &c., should in such a case be ready to be produced if required. *Johnson v. Kershaw*, 1847, 1 De G. & S. at p. 264.

²⁴ If a counterpart is known to exist, it is the safest course to produce or account for it: *Munn v. Godbold*, 1825, 3 Bing. 297; *R. v. Castleton*, 1795, 6 T. R. 236.

²⁵ 42 & 43 Vict. c. 11, ss. 3, 5.

AMERICAN NOTE.

GENERAL.

Authorities.— 1 Greenleaf on Evidence (15th ed.), sec. 558 *et seq.*;
1 Wharton on Evidence, sec. 150 *et seq.*

If there are several originals, all must be accounted for in order to let in secondary evidence. *Dyer v. Fredericks*, 63 Me. 173, 592.

Some authorities hold that, if a document comes in collaterally, secondary evidence may, in all cases, be introduced. *Phinney v. Holt*, 50 Me. 270.

In possession of adverse party.— *Overlock v. Hall*, 81 Me. 348; *Weston v. Hight*, 18 Me. 281; *Lowell v. Flint*, 20 Me., pt. 2, 401; *Orr v. Clark*, 62 Vt. 136, 19 Atl. 929.

If in court, a verbal notice to produce is sufficient. *Overlock v. Hall*, 81 Me. 348.

Document lost or destroyed.— *Tobin v. Shaw*, 45 Me. 331, 71 Am. Dec. 547; *Gates v. Bowker*, 18 Vt. 23; *Spear v. Tilson*, 24 Vt. 420.

Out of jurisdiction.— If the document is in the hands of a third person, out of the jurisdiction, beyond the control of the party, secondary evidence is admissible. *Bowman v. Sanborn*, 5 Fost. (N. H.) 87, 112; *Beattie v. Hilliard*, 55 N. H. 428; *Knowlton v. Knowlton*, 84 Me. 283, 24 Atl. 847; *Burnham v. Wood*, 8 N. H. 334; *Little v. Paddleford*, 13 N. H. 167; *Lord v. Staples*, 23 N. H. 448.

CONNECTICUT.

Though in all cases of the destruction or loss of a written instrument, the party who desires to avail himself of such instrument must ultimately satisfy the triers that it once existed, and as to the nature of its contents, yet the order of introducing his proofs is immaterial. *Fitch v. Bogue*, 19 Conn. 289–291.

The amount of evidence required to prove the loss of a written instrument, for the purpose of admitting secondary evidence of its contents, depends much upon the nature of the instrument, the reasons of its preservation, and the circumstances of the case. *Waller v. Eleventh School District*, 22 Conn. 333.

A party may be received to testify to the court that an instrument declared upon, or which it becomes necessary to use in the progress of the trial, is destroyed or lost, for the purpose of laying a foundation for the introduction of secondary evidence; nor need he first show, by disinterested witnesses, that the instrument once

existed, or that search has been made for it. *Fitch v. Bogue*, 19 Conn. 289-291.

The question whether the loss of a document has been satisfactorily proved, so that secondary evidence of its contents can be admitted, is wholly one of discretion with the judge trying the case, and cannot be reviewed on error. *Elwell v. Mersick*, 50 Conn. 274.

It is enough if the preliminary proof establishes a reasonable presumption of the loss of the document. *Elwell v. Mersick*, 50 Conn. 276.

Where the original paper is in the hands of a third person, out of the jurisdiction of the court, secondary evidence of its contents is admissible. *Elwell v. Mersick*, 50 Conn. 276.

This rule applies to a letter-press copy of a telegraph dispatch, accompanied by proof that the dispatch was sent. *Elwell v. Mersick*, 50 Conn. 276.

Also to invoices of goods, when the originals were on file in the custom-house in another State. *Elwell v. Mersick*, 50 Conn. 277, 278.

It is very difficult to lay down any general rule as to the degree of diligence necessary to be used in searching for an original document, to entitle a party to give secondary evidence of its contents; but, in general, the best evidence of the loss, which the nature of the case admits of, will be required. *Kelsey v. Hanmer*, 18 Conn. 316.

If a party, who can bring into court a written instrument, does not produce it, or take the necessary steps to obtain its production, but resorts to secondary evidence, the fair presumption is that the original document would not correspond with such evidence; and, therefore, the law requires the use of all reasonable measures to produce the primary evidence, before that which is secondary can be admitted. *Witter v. Latham*, 12 Conn. 399.

The degree of diligence depends largely on the circumstances of each particular case. *Witter v. Latham*, 12 Conn. 399.

A letter from the plaintiff to a third party was traced to the hands of the latter, who had since gone to parts unknown. Held, that the defendant could offer secondary evidence; without first calling on the plaintiff for the letter. *Sterling v. Buckingham*, 46 Conn. 464.

It is purely a question for the court whether the loss or destruction of an instrument has been so far proved as to let in secondary evidence of its contents. *Witter v. Latham*, 12 Conn. 399, 400.

By statute, the certificate of discharge to an insolvent was to be recorded, and an authenticated copy was made legal evidence. To prove that a discharge was granted, a party in a collateral proceeding introduced the testimony of the commissioners, that they had granted the certificate, and made due return; of the clerk of the court, that he had searched the files and found nothing; and of the debtor, that he had received a certificate, but had not seen it for a number of years, and did not know where it was. Held, that the production of the certificate, or a copy, was excused, and that secondary evidence was admissible. *Witter v. Latham*, 12 Conn. 398, 399.

The sister of the prisoner having testified that his relations with her mother and herself were pleasant, was asked on cross-examination whether her mother and she had not gone to the prosecuting attorney to request him to write the prisoner a letter telling him not to come home. She replied that it was so. The attorney for the State then requested of the prisoner's counsel the production of the letter and offered to wait for it to be procured. Held, that, the letter not being produced, and there being no request for time to get it, its contents might be stated by a person to whom the prisoner read it. *State v. Swift*, 57 Conn. 508, 509.

A photograph to show the appearance of an object which cannot be produced nor inspected is secondary evidence, and its accuracy must be established before it can be admitted, while the strength or cogency of such preliminary evidence varies with the nature of the proof the photograph is intended to supply. *Cunningham v. F. H. & W. R. R. Co.*, 72 Conn. 244.

That a paper is in the hands of an attorney, under such circumstances that he cannot be compelled to produce it, is sufficient to justify introducing a copy of it in evidence. *Lynde v. Judd*, 3 Day, 499.

To prove the payment of money, for which a written receipt was given, it is not necessary to produce the receipt, when the facts can be established without it. *Willimantic School Society v. First School Society*, 14 Conn. 468.

The execution and delivery of a written document may and must be proved by parol evidence. *Stoddard v. Mix*, 14 Conn. 22.

One who has obtained money for A from B, upon a written order, may testify for A as to this fact, and as to the amount received, without producing or accounting for the absence of the order. *Douglas v. Chapin*, 26 Conn. 92.

In a suit on a note against the administrator of the maker, the plaintiff introduced evidence that she had duly exhibited the note, together with a claim on book account against the intestate, to the defendant, and given him copies of each. Held, that the defendant might show that a suit had been commenced on the book account, and a certain sum paid by him in satisfaction thereof, without producing the copy of the account left with him. *Raymond v. Sellick*, 10 Conn. 483.

The admission of a party that he received a sum, by the levy of an execution on the estate of a third person, may be given in evidence to show the receipt without producing the judgment and execution. *Botsford v. Sanford*, 2 Conn. 281.

Where the plaintiff's right of recovery depends upon a written instrument, it must be produced at the trial, or, in case of loss, there must be clear and precise evidence of its contents. *Hampton v. Windham*, 2 Root, 201.

Where the plaintiff declares upon a writing, and alleges that it is lost or destroyed, the loss or destruction is a preliminary question for the court, not a material and traversable fact to be determined by the jury. *Witter v. Latham*, 12 Conn. 400; *Fitch v. Bogue*, 19 Conn. 289, overruling *Coleman v. Wolcott*, 4 Day, 394, and *Paddock v. Higgins*, 2 Root, 483.

In hands of adverse party.—*Sedgwick v. Waterman*, 2 Root, 434; *Morgan v. Minor*, 2 Root, 220; *Ross v. Bruce*, 1 Day, 100.

Out of jurisdiction.—Where a document is out of the jurisdiction in the hands of a third party, secondary evidence is admissible. *Elwell v. Mersick*, 50 Conn. 274; *Shepard v. Giddings*, 22 Conn. 283.

Lost document.—*Kelley v. Riggs*, 2 Root, 128; *Kelsey v. Hanmer*, 18 Conn. 317; *Elwell v. Mersick*, 50 Conn. 274; *Bank of United States v. Sill*, 5 Conn. 106, 13 Am. Dec. 44.

In possession of third person.—*Sherwood v. Hubbel*, 1 Root, 498; *Halsey v. Fanning*, 2 Root, 101; *Lynde v. Judd*, 3 Day, 499.

MASSACHUSETTS.

In some States, as in England, there are no degrees in secondary evidence. *Com. v. Smith*, 151 Mass. 491.

In possession of adverse party.—*Thayer v. Middlesex Mut. Ins. Co.*, 10 Pick. 326; *Dana v. Kemble*, 19 Pick. 112; *Narragansett Bank v. Atlantic Silk Co.*, 3 Metc. 282; *Coolidge v. Brigham*, 5 Metc. 68; *Loring v. Whittemore*, 13 Gray, 228; *Dooley v. Cheshire Glass*

Co., 15 Gray, 494; *Day v. Floyd*, 130 Mass. 488; *Morse v. Woodworth*, 155 Mass. 233, 29 N. E. 525; *Com. v. Shurn*, 145 Mass. 150.

Document lost or destroyed.—*McConnell v. Wildes*, 153 Mass. 487; *Hatch v. Carpenter*, 9 Gray, 271; *Oriental Bank v. Haskins*, 3 Metc. 332, 37 Am. Dec. 140.

But one who has intentionally destroyed an instrument cannot give evidence as to its contents, without first giving evidence to rebut the suspicion of fraud, arising from the act. *Joannes v. Bennett*,⁶ 5 Allen, 169.

Out of jurisdiction.—If the document is in the hands of a third person out of the jurisdiction, secondary evidence is admissible. *Stevens v. Miles*, 142 Mass. 571; *L'Herbette v. Pittsfield Nat. Bank*, 162 Mass. 137; *Eaton v. Campbell*, 7 Pick. 10.

Not easily movable.—*North Brookfield v. Warren*, 16 Gray, 171, 174; *Stearns v. Doe*, 12 Gray, 482.

Numerous documents.—Sustaining text: *Boston & W. R. R. Co. v. Dana*, 1 Gray, 83.

ARTICLE 72.*

RULES AS TO NOTICE TO PRODUCE.

Secondary evidence of the contents of the documents referred to in Article 71 (*a*) may not be given unless the party proposing to give such secondary evidence has,

if the original is in the possession or under the control of the adverse party, given him such notice to produce it as the Court regards as reasonably sufficient to enable it to be procured;²⁶ or has,

if the original is in the possession of a stranger to the action, served him with a *subpœna duces tecum* requiring its production;²⁷

* See Note XXIX.

²⁶ *Dwyer v. Collins*, 1852, 7 Ex. at p. 648.

²⁷ *Newton v. Chaplin*, 1850, 10 C. B. 356.

if a stranger so served does not produce the document, and has no lawful justification for refusing or omitting to do so, his omission does not entitle the party who served him with the *subpœna* to give secondary evidence of the contents of the document.²⁸

Such notice is not required in order to render secondary evidence admissible in any of the following cases—

(1) When the document to be proved is itself a notice ;

(2) When the action is founded upon the assumption that the document is in the possession or power of the adverse party and requires its production ;²⁹

(3) When it appears or is proved that the adverse party has obtained possession of the original from a person subpœnaed to produce it ;³⁰

(4) When the adverse party or his agent has the original in court.³¹

AMERICAN NOTE.

GENERAL.

Authorities.—1 Taylor on Evidence (Chamberlayne's 9th ed.), sec. 440 *et seq.* ; 1 Greenleaf on Evidence (15th ed.), sec. 561.

Notice to produce.—*Abbott v. Wood*, 22 Me. 541 ; *Inhabitants of Belfast v. Inhabitants of Washington*, 46 Me. 460 ; *Webster v. Clark*, 30 N. H. 245 ; *Curtis v. Ingham*, 2 Vt. 287 ; *Murray v. Mattison*, 67 Vt. 553, 32 Atl. 479 ; *Baker v. Pike*, 33 Me. 213.

Suit on assumption that adverse party has document.—*Dana v. Conant*, 30 Vt. 246, 257 ; *Morrill v. B. & M. R. R. Co.*, 58 N. H. 68 ; *State v. Mayberry*, 48 Me. 218.

²⁸ *R. v. Llanfaethly*, 1853, 2 E. & B. 940.

²⁹ *How v. Hall*, 1811, 14 Ea. 274. In an action on a bond, no notice to produce the bond is required. See other illustrations in 2 Ph. Ev. 273 ; Taylor, s. 452.

³⁰ *Leeds v. Cook*, 1803, 4 Esp. 256.

³¹ Formerly doubted, see 2 Ph. Ev. 278, but so held in *Dwyer v. Collins*, 1852, 7 Ex. 639.

CONNECTICUT.

Notice to produce.—*Shepard v. Giddings*, 22 Conn. 232.

MASSACHUSETTS.

Notice to produce.—*Draper v. Hatfield*, 124 Mass. 53; *Roberts v. Spencer*, 123 Mass. 397; *Bourne v. Buffington*, 125 Mass. 481; *Com. v. Sullivan*, 156 Mass. 229; *Com. v. Emery*, 2 Gray, 80; *Bourne v. Boston*, 2 Gray, 494; *Brackett v. Evans*, 1 Cush. 79; *Harris v. Whitcomb*, 4 Gray, 433.

Unlawful refusal of stranger to produce.—*Bull v. Loveland*, 10 Pick. 14.

Document itself a notice.—*Eagle Bank v. Chapin*, 3 Pick. 180; *Quinley v. Atkins*, 9 Gray, 370.

CHAPTER X.

PROOF OF PUBLIC DOCUMENTS.

ARTICLE 73.

PROOF OF PUBLIC DOCUMENTS.

WHEN a statement made in any public document, register, or record, judicial or otherwise, or in any pleading or deposition kept therewith is in issue, or is relevant to the issue in any proceeding, the fact that that statement is contained in that document, may be proved in any of the ways mentioned in this chapter.¹

ARTICLE 74.

PRODUCTION OF DOCUMENT ITSELF.

The contents of any public document whatever may be proved by producing the document itself for inspection from proper custody, and identifying it as being what it professes to be.

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), secs. 479–484, 501; 1 Wharton on Evidence, sec. 635; *State v. Lynde*, 77 Me. 56.

As to proving records of other States, see U. S. Rev. Stats., secs. 905, 906.

¹ See articles 36 & 90.

As to proving foreign records, see *Watson v. Walker*, 23 N. H. 471, 496; *Spalding v. Vincent*, 24 Vt. 501, 504.

CONNECTICUT.

Phelps v. Hunt, 43 Conn. 194.

A record may be proved by its mere production, if such be had, as well as by a copy. *Gray v. Davis*, 27 Conn. 453.

Upon a writ of error from the judgment of a justice of the peace, each party produced a certified copy of the record below; but the copies did not agree. Held, that the court might send for the original record. *Allin v. Hiscock*, 1 Root, 88.

A certified copy of the doings of a meeting of a school district showed that a certain vote, otherwise material to the case, was not authorized by the warning. Held, that this evidence of the vote was inadmissible for any purpose. If evidence of the vote were admissible to show the sentiments of the majority present at the meeting, it could not be proved by a certified copy; since this can only prove matters on which the meeting could lawfully act. *Wilson v. Waltersville School District*, 44 Conn. 159, 160.

A certificate of marriage is treated in this State as an original document, and need not be authenticated as a copy. *Northrop v. Knowles*, 52 Conn. 525, 526; *Erwin v. English*, 61 Conn. 507.

In a prosecution under General Statutes, section 3402, for neglect to support a wife, it was held, that the marriage certificate was admissible as original evidence of the marriage. *State v. Schweitzer*, 57 Conn. 537.

A town clerk's certificate that J S was enrolled as a voter on the town register of voters made for a certain State election, is inadmissible to prove that fact; a certified copy of the record being the proper evidence. *New Milford v. Sherman*, 21 Conn. 112.

The certificate of an officer as to the contents of a record in his custody is not admissible as a copy of such record, or of the fact therein recited; even if such certificate is properly authenticated. *Enfield v. Ellington*, 67 Conn. 459.

In determining whether ancient documents purporting to be original records, are in fact such, their general appearance, the place where they were found and the length of time during which they have been there, are all entitled to weight. The omission of the proper attestation does not destroy their character as records. *Enfield v. Ellington*, 67 Conn. 459.

ARTICLE 75.*

EXAMINED COPIES.

The contents of any public document whatever may in all cases be proved by an examined copy.

An examined copy is a copy proved by oral evidence to have been examined with the original and to correspond therewith. The examination may be made either by one person reading both the original and the copy, or by two persons, one reading the original and the other the copy, and it is not necessary (except in peerage cases²) that each should alternately read both.³

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), secs. 91, 485, 501, 508; 1 Wharton on Evidence, sec. 94.

Whitehouse v. Beckford, 9 Fost. (N. H.) 471, 480; *State v. Loughlin*, 66 N. H. 266; *State v. Lynde*, 77 Me. 561; *State v. Spaulding*, 60 Vt. 228.

CONNECTICUT.

Method of comparison.—*Lynde v. Judd*, 3 Day, 500.

ARTICLE 76.

GENERAL RECORDS OF THE REALM.

Any record under the charge and superintendence of the Master of the Rolls for the time being, may be proved by

* See Note XXX., also *Doe v. Ross*, 1840, 7 M. & W. at p. 106.

² *Slane Peerage Case*, 1835, 5 C. & F. at p. 42.

³ 2 Ph. Ev. 200, 231; Taylor, s. 1545; R. N. P. 98.

a copy certified as a true and authentic copy by the deputy keeper of the records or one of the assistant record keepers, and purporting to be sealed or stamped with the seal of the Record Office.⁴

AMERICAN NOTE.

GENERAL.

Authorities.— 1 Greenleaf on Evidence (15th ed.), sec. 499 *et seq.*

As to authentication of copies of the public records of the Federal government, see U. S. Rev. Stat., secs. 882–898.

CONNECTICUT.

As to copies of public documents, see Gen. Stats., sec. 313.

MASSACHUSETTS.

As to copies of records, see Pub. Stat., chap. 169, sec. 70.

ARTICLE 77.*

EXEMPLIFICATIONS.

An exemplification is a copy of a record set out either under the Great Seal or under the Seal of a Court.

A copy made by an officer of the Court, bound by law to make it, is equivalent to an exemplification, though it is sometimes called an office copy.

An exemplification is equivalent to the original document exemplified.

AMERICAN NOTE.

GENERAL.

Authorities.— 1 Wharton on Evidence, secs. 95, 105, 107; 1 Greenleaf on Evidence (15th ed.), secs. 488, 501; Taylor on Evidence (Chamberlayne's 9th ed.), p. 1179 *et seq.*

⁴ 1 & 2 Vict. c. 94, ss. 1, 12, 13.

* See Note XXXI.

Copies of any records made by a public officer are sometimes called "office copies." *Elwell v. Cunningham*, 74 Me. 127.

The term "exemplification" is also applied to foreign records. *Watson v. Walker*, 23 N. H. 471; *Spaulding v. Vincent*, 24 Vt. 501.

As to exemplification under act of Congress, see U. S. Rev. Stats., secs. 905, 906.

MASSACHUSETTS.

Copies of any records made by a public officer are sometimes called "office copies," or "certified copies." *Gragg v. Learned*, 109 Mass. 167; *Samuels v. Borrowscale*, 104 Mass. 207.

ARTICLE 78.*

COPIES EQUIVALENT TO EXEMPLIFICATIONS.

A copy made by an officer of the Court, who is authorised to make it by a rule of Court, but not required by law to make it, is regarded as equivalent to an exemplification in the same Cause and Court, but in other Causes or Courts it is not admissible unless it can be proved as an examined copy.

AMERICAN NOTE.

GENERAL.

Authorities.—1 Wharton on Evidence, secs. 104, 105; 1 Greenleaf on Evidence (15th ed.), sec. 507.

ARTICLE 79.

CERTIFIED COPIES.

It is provided by many statutes that various certificates, official and public documents, documents and proceedings of corporations, and of joint stock and other companies, and certified copies of documents, bye-laws, entries in registers

* See Note XXXI.

and other books, shall be receivable in evidence of certain particulars in Courts of Justice, provided they are respectively authenticated in the manner prescribed by such statutes.⁵

Whenever, by virtue of any such provision, any such certificate or certified copy as aforesaid is receivable in proof of any particular in any Court of Justice, it is admissible as evidence if it purports to be authenticated in the manner prescribed by law without proof of any stamp, seal, or signature required for its authentication or of the official character of the person who appears to have signed it.⁶

Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom is admissible in proof of its contents,⁷ provided it purport to be signed and

⁵ 8 & 9 Vict. c. 113, preamble. Many such statutes are specified in Taylor, ss. 1601 n.; 1611 n. See, too, R. N. P. 98, 99, and the Appendix to this work.

⁶ *Ibid.* s. 1. I believe the above to be the effect of the provision, but the language is greatly condensed. Some words at the end of the section are regarded as unmeaning by several text writers. See *e. g.*, Roscoe's N. P., p. 100; 2 Ph. Ev. 241; Taylor, 7th ed. s. 7, note 1. Mr. Taylor says that the concluding words of the section were introduced into the Act while passing through the House of Commons. He adds, they appear to have been copied from 1 & 2 Vict. c. 94, s. 13 (see art. 76), "by some honourable member who did not know distinctly what he was about." They certainly add nothing to the sense.

⁷ The words "provided it be proved to be an examined copy or extract or," occur in the Act, but are here omitted because their effect is given in Article 75.

certified as a true copy or extract by the officer to whose custody the original is intrusted. Every such officer must furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words.⁸

AMERICAN NOTE.

GENERAL.

Authorities.—2 Wharton on Evidence, secs. 1313, 1314.

Certified copies, to be admissible, must be authorized by law. *Jay v. East Livermore*, 56 Me. 107.

Federal statutes.—U. S. Rev. Stat., secs. 882–900, 905, 906, 908.

As to their construction, see 1 Greenleaf on Evidence (15th ed.), secs. 504–506.

CONNECTICUT.

Enfield v. Ellington, 67 Conn. 459.

A copy of the record of an examination in bankruptcy proceedings lacking the certificate of the judge required by United States Revised Statutes, section 905, is inadmissible in evidence. *Smith v. Brockett*, 69 Conn. 500.

As to certified copies of certain records, see Gen. Stats., sec. 313.

As to copies of private acts, see Gen. Stats., sec. 1087.

To prove the existence of a record title in a party to land in another State, a copy of the deed certified by the recording officer is not admissible, but the proof must be by a sworn copy. *Phelps v. Foot*, 1 Conn. 390.

MASSACHUSETTS.

Certified copies to be admissible must be authorized by law. *Wayland v. Ware*, 109 Mass. 248.

In some States such copies may be used, the custom from time immemorial justifying their admission. *Chamberlain v. Ball*, 15 Gray, 352.

As to record of courts of other States, see Pub. Stats., p. 992.

As to proof of the statutes of the State, see Pub. Acts of 1889, chap. 387, pp. 992, 993.

As to proof of foreign records, see *Butrick v. Allen*, 8 Mass. 273, 5 Am. Dec. 105.

ARTICLE 80.

* DOCUMENTS ADMISSIBLE THROUGHOUT THE QUEEN'S DOMINIONS.

If by any law in force for the time being any document is admissible in evidence of any particular either in Courts of Justice in England and Wales, or in Courts of Justice in Ireland, without proof of the seal, or stamp, or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, that document is also admissible in evidence to the same extent and for the same purpose, without such proof as aforesaid, in any Court or before any judge in any part of the Queen's dominions except Scotland.⁹

ARTICLE 81.

QUEEN'S PRINTERS' COPIES.

The contents of Acts of Parliament, not being public Acts, may be proved by copies thereof purporting to be printed by the Queen's printers;

⁹ Consolidates 14 & 15 Vict. c. 99, ss. 9, 10, 11, 19. Sect. 9 provides that documents admissible in England shall be admissible in Ireland; sect. 10 is the converse of 9; sect. 11 enacts that documents admissible in either shall be admissible in the "British Colonies;" and sect. 19 defines the British Colonies as including India, the Channel Islands, the Isle of Man, and "all other possessions" of the British Crown, wheresoever and whatsoever. This cannot mean to include Scotland, though the literal sense of the words would perhaps extend to it.

The journals of either House of Parliament; and
Royal proclamations,
may be proved by copies thereof purporting to be printed
by the printers to the Crown or by the printers to either
House of Parliament.¹⁰

ARTICLE 82.

PROOF OF IRISH STATUTES.

The copy of the statutes of the kingdom of Ireland enacted by the Parliament of the same prior to the union of the kingdoms of Great Britain and Ireland, and printed and published by the printer duly authorised by King George III. or any of his predecessors, is conclusive evidence of the contents of such statutes.¹¹

ARTICLE 83.

PROCLAMATIONS, ORDERS IN COUNCIL, ETC.

The contents of any proclamation, order, or regulation issued at any time by Her Majesty or by the Privy Council, and of any proclamation, order, or regulation issued at any time by or under the authority of any such department of the Government or officer as is mentioned in the first

¹⁰ 8 & 9 Vict. c. 113, s. 3. Is there any difference between the Queen's printers and the printers to the Crown?

¹¹ 41 Geo. III. c. 90, s. 9. .

column of the note¹² hereto, may be proved in all or any of the modes hereinafter mentioned; that is to say—

(1) By the production of a copy of the Gazette purporting to contain such proclamation, order, or regulation:

12	COLUMN 1.	COLUMN 2.
	Name of Department or Officer.	Names of Certifying Officers.
	The Commissioners of the Treasury.	Any Commissioner, Secretary, or Assistant Secretary of the Treasury.
	The Commissioners for executing the Office of Lord High Admiral.	Any of the Commissioners for executing the Office of Lord High Admiral or either of the Secretaries to the said Commissioners.
	Secretaries of State.	Any Secretary or under-Secretary of State.
	Committee of Privy-Council for Trade.	Any Member of the Committee of Privy Council for trade or any Secretary or Assistant Secretary of the said Committee.
	The Local Government Board (which takes the place of the Poor Law Board, <i>inter alios</i>).	The President or an ex-officio member of the Board; or any Secretary or Assistant Secretary of the Board (34 & 35 Vict. c. 70, s. 5).

[Schedule to 31 & 32 Vict. c. 37.]

The Postmaster General.	Any Secretary or Assistant Secretary of the Post Office (33 & 34 Vict. c. 79, s. 21).
The Board of Agriculture.	The President or any member of the Board, or the Secretary of the Board, or any person authorised by the President to act on his behalf (58 Vict. c. 9, s. 1).

(2) By the production of a copy of such proclamation, order, or regulation purporting to be printed by the Government printer, or, where the question arises in a Court in any British colony or possession, of a copy purporting to be printed under the authority of the legislature of such British colony or possession :

(3) By the production, in the case of any proclamation, order, or regulation issued by Her Majesty or by the Privy Council, of a copy or extract purporting to be certified to be true by the Clerk of the Privy Council or by any one of the Lords or others of the Privy Council, and, in the case of any proclamation, order, or regulation issued by or under the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said note in connection with such department or officer.

Any copy or extract made under this provision may be in print or in writing, or partly in print and partly in writing.

No proof is required of the handwriting or official position of any person certifying, in pursuance of this provision, to the truth of any copy of or extract from any proclamation, order or regulation.¹³

Subject to any law that may be from time to time made by the legislature of any British Colony or possession, this provision is in force in every such colony and possession.¹⁴

Where any enactment, whether passed before or after June, 1882, provides that a copy of any Act of Parliament,

¹³ 31 & 32 Vict. c. 37, s. 2.

¹⁴ 31 & 32 Vict. c. 37, s. 3.

proclamation, order, regulation, rule, warrant, circular, list, gazette, or document shall be conclusive evidence, or be evidence, or have any other effect when purporting to be printed by the Government printer, or the Queen's printer, or a printer authorised by Her Majesty, or otherwise under Her Majesty's authority, whatever may be the precise expression used, such copy shall also be conclusive evidence, or evidence, or have the said effect, as the case may be, if it purports to be printed under the superintendence or authority of Her Majesty's Stationery Office.¹⁵

ARTICLE 84.

FOREIGN AND COLONIAL ACTS OF STATE, JUDGMENTS, ETC.

All proclamations, treaties, and other acts of state of any foreign state, or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any Court of Justice in any foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such Court, may be proved either by examined copies or by copies authenticated as hereinafter mentioned; that is to say—

If the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state or British possession to which the original document belongs;

¹⁵ 45 Vict. c. 9, s. 2, Documentary Evidence Act, 1882. Sect. 4 extends the Act of 1868 to Ireland.

And if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign Court, in any British possession, or an affidavit, pleading, or other legal document filed or deposited in any such Court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or other Court to which the original document belongs, or, in the event of such Court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the judges of the said Court, and such judge must attach to his signature a statement in writing on the said copy that the court whereof he is judge has no seal;

If any of the aforesaid authenticated copies purports to be sealed or signed as hereinbefore mentioned, it is admissible in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.¹⁶

Colonial laws assented to by the governors of colonies, and bills reserved by the governors of such colonies for the signification of Her Majesty's pleasure, and the fact (as the case may be) that such law has been duly and properly passed and assented to, or that such bill has been duly and properly passed and presented to the governor, may be proved (*prima facie*) by a copy certified by the clerk or

other proper officer of the legislative body of the colony to be a true copy of any such law or bill. Any proclamation purporting to be published by authority of the governor in any newspaper in the colony to which such law or bill relates, and signifying Her Majesty's disallowance of any such colonial law, or Her Majesty's assent to any such reserved bill, is *prima facie* proof of such disallowance or assent.¹⁷

ARTICLE 84A.

ANSWERS OF SECRETARY OF STATE AS TO FOREIGN JURISDICTION.

The answers of a Secretary of State to questions in a document under the seal of a Court in Her Majesty's dominions or held under the authority of Her Majesty, framed so as to raise any question which has arisen in any proceedings, civil or criminal, in such Court, as to the existence, or extent, of any jurisdiction of Her Majesty in a foreign country, are conclusive evidence of the matters therein contained; and the decision of the Secretary of State, are for the purpose of the proceedings, final.¹⁸

¹⁷ 28 & 29 Vict. c. 63, s. 6. "Colony" in this paragraph means "all Her Majesty's possessions abroad" having a legislature, "except the Channel Islands, the Isle of Man, and India." "Colony" in the rest of the article includes those places.

¹⁸ 53 & 54 Vict. c. 37, s. 4.

CHAPTER XI.

PRESUMPTIONS AS TO DOCUMENTS.

ARTICLE 85.

PRESUMPTION AS TO DATE OF A DOCUMENT.

WHEN any document bearing a date has been proved, it is presumed to have been made on the day on which it bears date, and if more documents than one bear date on the same day, they are presumed to have been executed in the order necessary to effect the object for which they were executed, but independent proof of the correctness of the date will be required if the circumstances are such that collusion as to the date might be practised, and would, if practised, injure any person, or defeat the objects of any law.¹

Illustrations.

(a) An instrument admitting a debt, and dated before the act of bankruptcy, is produced by a bankrupt's assignees, to prove the petitioning creditor's debt. Further evidence of the date of the transaction is required in order to guard against collusion between the assignees and the bankrupt, to the prejudice of creditors whose claims date from the interval between the act of bankruptcy and the adjudication.²

(b) In a petition for damages on the ground of adultery letters are produced between the husband and wife, dated before the alleged adultery, and showing that they were then on affectionate terms.

¹ 1 Ph. Ev. 482-3; Taylor, s. 169; Best, s. 402.

² *Anderson v. Weston*, 1840, 6 Bing. N. C. at p. 301; *Sinclair v. Baggallay*, 1838, 4 M. & W. 312.

Further evidence of the date is required to prevent collusion, to the prejudice of the person petitioned against.³

AMERICAN NOTE.

GENERAL.

Authorities.— 2 Wharton on Evidence, secs. 977, 988, 1312; 8 Am. & Eng. Encyclopædia of Law (2d ed.), p. 729.

(First clause of text.) *Pullen v. Hutchinson*, 25 Me. 249; *Cutts v. York Mfg. Co.*, 18 Me. 190; *Sweetser v. Lowell*, 33 Me. 446; *Hill v. McNichol*, 80 Me. 209; *Brooks v. Chaplin*, 3 Vt. 282, 23 Am. Dec. 209.

Order of execution.— *Loomis v. Pingree*, 43 Me. 299.

It presents a question for the jury. *Gilman v. Moody*, 43 N. H. 239.

CONNECTICUT.

Dudley v. Cadwell, 19 Conn. 218; *New Haven County Bank v. Mitchell*, 15 Conn. 206.

If an attachment of lands and a deed of the same by the debtor are made on the same day, and the attachment appears on the town records to have been made six hours before the deed was lodged for record, it will be presumed, in the absence of all evidence to the contrary, that the deed was delivered after the attachment. *Bissell v. Nooney*, 33 Conn. 417.

In ejectment against a mortgagor, by one claiming under a deed with full covenants of title from the holder of a second mortgage, the plaintiff introduced, in proof of his grantor's title, a quitclaim deed to him from the holder of the first mortgage, executed on the same day with the deed to himself, and to which his own signature was affixed as one of the witnesses. Both deeds were also acknowledged before and witnessed by the same magistrate. Held, that it was unnecessary to introduce extraneous evidence to show that the quitclaim deed was executed and delivered before the other, as it was reasonable to suppose that such was the fact, and the transaction ought to be so construed as to carry out the obvious intent of the parties. *Dudley v. Cadwell*, 19 Conn. 225.

MASSACHUSETTS.

(First paragraph of text.) *Smith v. Porter*, 10 Gray, 66, 68; *Oranson v. Goss*, 107 Mass. 439.

³ *Houlston v. Smith*, 1825, 2 C. & P. at p. 24.

ARTICLE 86.

PRESUMPTION AS TO STAMP OF A DOCUMENT.

When any document is not produced after due notice to produce, and after being called for, it is presumed to have been duly stamped,⁴ unless it be shown to have remained unstamped for some time after its execution.⁵

ARTICLE 87.

PRESUMPTION AS TO SEALING AND DELIVERY OF DEEDS.

When any document purporting to be and stamped as a deed, appears or is proved to be or to have been signed and duly attested, it is presumed to have been sealed and delivered, although no impression of a seal appears thereon.⁶

AMERICAN NOTE.

GENERAL.

Authorities.—2 Wharton on Evidence, sec. 1314.

Modifying rule of text: *Boothbay v. Giles*, 68 Me. 160.

Any irregularity in this regard may be corrected in an equitable proceeding. *Harding v. Jewell*, 73 Me. 426. See also *State v. Peck*, 53 Me. 284, 286; *Barnett v. Abbott*, 53 Vt. 120.

MASSACHUSETTS.

Ward v. Lewis, 4 Pick. 518, 520; *Mill Dam Foundry v. Hovey*, 21 Pick. 417, 428; *Bradford v. Randall*, 5 Pick. 496; *Brolley v. Lapham*, 13 Gray, 294.

⁴ *Closmadeuc v. Carrel*, 1856, 18 C. B. 36. In this case the growth of the rule is traced, and other cases are referred to, in the judgment of Cresswell, J.

⁵ *Marine Investment Company v. Haviside*, 1872, L. R. 5 H. L. 624.

⁶ *Hall v. Bainbridge*, 1848, 12 Q. B. 699, at p. 710. *Re Sandilands*, 1871, L. R. 6 C. P. 411.

A deed, regular upon its face, and found in the hands of the grantee, is presumed to have been delivered. *Butrick v. Tilton*, 141 Mass. 93.

ARTICLE 88.

PRESUMPTION AS TO DOCUMENTS THIRTY YEARS OLD.

Where any document purporting or proved to be thirty years old is produced from any custody which the judge in the particular case considers proper, it is presumed that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested, by the persons by whom it purports to be executed and attested; and the attestation or execution need not be proved, even if the attesting witness is alive and in court.

Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.⁷

AMERICAN NOTE.

GENERAL.

Authorities.—1 Wharton on Evidence, secs. 194–199, 703, 732; 1 Greenleaf on Evidence (15th ed.), secs. 21, 142, 143, 144, 570; 2 Am. & Eng. Encyclopædia of Law (2d ed.), p. 324 *et seq.*; *Crane v. Marshall*, 16 Me. 27, 33 Am. Dec. 631; *Goodwin v. Jack*, 62 Me.

⁷ 2 Ph. Ev. 245–8; Starkie, 521–6; Taylor, s. 87 and ss. 658–667; Best, s. 220.

414; *Clark v. Wood*, 34 N. H. 447; *Lawrence v. Tennant*, 64 N. H. 532, 15 Atl. 543.

In order that the presumption arise as stated in the text the grantee's possession of the land must be shown; *Waldron v. Tuttle*, 4 N. H. 371; *Bank of Middlebury v. Rutland*, 33 Vt. 414; *Horner v. Cilley*, 14 N. H. 85; *Clark v. Wood*, 34 N. H. 447; *Crane v. Marshall*, 16 Me. 29, 33 Am. Dec. 631.

CONNECTICUT.

A document (*e. g.*, "land plans" of a railroad) produced from its proper custody where it has been kept more than thirty years is admitted without other proof of its authenticity, *i. e.*, that it was what it purported to be. *New Haven v. N. Y., N. H. & H. R. R. Co.*, 72 Conn. 232.

MASSACHUSETTS.

Stockbridge v. West Stockbridge, 14 Mass. 257; *Floyd v. Tewksbury*, 129 Mass. 362; *Rust v. Boston Mill*, 6 Pick. 158; *Monumoi Great Beach v. Rogers*, 1 Mass. 159; *Pitts v. Temple*, 2 Mass. 538; *King v. Little*, 1 Cush. 436; *Boston v. Weymouth*, 4 Cush. 538; *Chenery v. Waltham*, 8 Cush. 327; *Boston v. Richardson*, 13 Allen, 146; *Palmer v. Stevens*, 11 Cush. 147; *Tolman v. Emerson*, 4 Pick. 160; *Boston v. Richardson*, 105 Mass. 351; *Whitman v. Shaw*, 166 Mass. 451, 460; *Pettengill v. Boynton*, 139 Mass. 244, 29 N. E. 655; *Green v. Inhabitants of Chelsea*, 24 Pick. 71.

Custody.—*Whitman v. Shaw*, 166 Mass. 460 (quoting this article).

ARTICLE 89.

PRESUMPTION AS TO ALTERATIONS.

No person producing any document which upon its face appears to have been altered in a material part can claim under it the enforcement of any right created by it, unless the alteration was made before the completion of the document or with the consent of the party to be charged under it or his representative in interest.

This rule extends to cases in which the alteration was made by a stranger, whilst the document was in the custody

of the person producing it, but without his knowledge or leave.⁸

Alterations and interlineations appearing on the face of a deed are, in the absence of all evidence relating to them, presumed to have been made before the deed was completed.⁹

Alterations and interlineations appearing on the face of a will are, in the absence of all evidence relating to them, presumed to have been made after the execution of the will.¹⁰

There is no presumption as to the time when alterations and interlineations, appearing on the face of writings not under seal, were made¹¹ except that it is presumed that they were so made that the making would not constitute an offence.¹²

An alteration is said to be material when, if it had been made with the consent of the party charged, it would have affected his interest or varied his obligations in any way whatever.

An alteration which in no way affects the rights of the parties or the legal effect of the instrument, is immaterial.¹³

⁸ *Pigot's Case*, 1604, 11 Coke's Rep. 47; *Davidson v. Cooper*, 1843, 11 M. & W. 778; 1844, 13 M. & W. 343; *Aldous v. Cornwell*, 1868, L. R. 3 Q. B. 573. This qualifies one of the resolutions in *Pigot's Case*. The judgment reviews a great number of authorities on the subject.

⁹ *Doe v. Catmore*, 1851, 16 Q. B. 745.

¹⁰ *Simmons v. Rudall*, 1880, 1 Sim. (N. S.) 136.

¹¹ *Knight v. Clements*, 1838, 8 A. & E. 215.

¹² *R. v. Gordon*, 1855, Dearsley & P. 592.

¹³ This appears to be the result of many cases referred to in Taylor, ss. 1822, 1823; see also the judgments in *Davidson v. Cooper* and *Aldous v. Cornwell*, referred to above.

AMERICAN NOTE.

GENERAL.

Authorities.—2 Am. & Eng. Encyclopædia of Law (2d ed.), p. 181 *et seq.*; 1 Greenleaf on Evidence (15th ed.), sec. 564 *et seq.*

Some authorities hold that all alterations are presumed to have been made after execution. *Burnham v. Ayer*, 35 N. H. 351.

Others, that there is no presumption as to when alterations are made, but that the whole question is for the jury. *Boothroy v. Stanley*, 34 Me. 515, 516.

Immaterial alterations.—*Burnham v. Ayer*, 35 N. H. 351.

CONNECTICUT.

(First paragraph of text.) *Starr v. Lyon*, 5 Conn. 540; *Coit v. Starkweather*, 8 Conn. 293.

In this country the rule does not extend to alterations made by a stranger without the consent of the person having custody. *Nichols v. Johnson*, 10 Conn. 192, 196; *Hayden v. Goodnow*, 39 Conn. 164; *Bailey v. Taylor*, 11 Conn. 541.

A deed of land materially altered by consent after execution and delivery is void unless attested and acknowledged anew. *Coit v. Starkweather*, 8 Conn. 293.

Where there is an erasure or interlineation in an instrument (whether under seal or not) under which a party derives his title, and the adverse party claims that such alteration was improperly made, the jury are, from all the circumstances before them, to determine whether the instrument is by such alteration rendered invalid, and the burden of explaining it does not necessarily, and in all cases, rest on the party claiming under the instrument. *Bailey v. Taylor*, 11 Conn. 541.

In an action on note, the defendant claimed that the note had been altered by reducing it from \$600 to \$500 without his knowledge or consent. Held, that the jury were properly instructed that if they found this claim true their verdict must be in his favor, without giving any instructions, although requested; that the burden of explaining the alteration rested on the plaintiff. *Bailey v. Taylor*, 11 Conn. 531, 541.

The party producing a paper is not necessarily bound to account for an erasure or alteration in it. The triers must ascertain if it was so made as to affect the validity of the instrument, in view

of all the circumstances of the case. *Hayden v. Goodnow*, 39 Conn. 169.

W had been indorsing for C's accommodation, for several years, a series of notes, all payable at and intended for discount at the plaintiff bank. He ordinarily indorsed the notes after they had been entirely filled up, and C always took them to the bank and negotiated the discounts. In a few instances, W indorsed notes in which the time of payment was left blank, to be filled in by C. C fraudulently "raised" the amount of one of the notes, after its indorsement, and then procured its discount, the avails being mainly used in taking up some of the earlier notes. Held, that W was not liable upon it, in the absence of any finding by the court below, that he had made C his agent for any such purpose, or had been guilty of such negligence as occasioned the plaintiff's loss. *Ætna National Bank v. Winchester*, 43 Conn. 406-408.

Any alteration in a deed, to render it void, must be a material one; that is, one which causes the deed to speak a language different in legal effect from that which it spoke originally. *Murray v. Klinzing*, 64 Conn. 85.

It seems, that a material alteration in a written instrument made by a stranger will not vitiate it. *Nichols v. Johnson*, 10 Conn. 197.

If the owner of goods sold at auction, in suing for the price, relies on the auctioneer's memorandum to prove the sale, and it appears that a material alteration has been made in the memorandum since its execution, there is no presumption that this was made by the plaintiff, rather than by a stranger. *Nichols v. Johnson*, 10 Conn. 197, 198.

An auctioneer's entry of a sale was followed by these words: "Auct. 6th March, 1826." Subsequently there was prefixed to the entry the words: "sales at auction, 6th March, 1826." Held, that the alteration was an immaterial one. *Nichols v. Johnson*, 10 Conn. 198.

A deed of land executed and delivered to E W was subsequently altered by the consent of the parties by adding the word "junior" after his name, and then redelivered. There was another and older E W in the same town. Held, that the alteration was immaterial, and that the deed was, therefore, unimpaired by it. *Coit v. Starkweather*, 8 Conn. 293.

Four days after a receipt was given to an officer for goods attached, B, a stranger to it, signed his name to it, the goods having

been in the meantime carried off by one C. The original receiptsman sued C in trespass, and, wishing to use B as a witness, cut his name from the receipt, with his consent, and that of the officer. Held, that the receipt was not destroyed. *Burrows v. Stoddard*, 3 Conn. 163.

It seems, that where a corporation issues stock certificates on a sheet containing also a printed blank for an assignment and power of attorney to transfer, and a stockholder dates and fills up this blank, except that he inserts no name for the assignee or attorney, and then signs, seals, and delivers it, the purchaser may, at any subsequent time, fill up these blanks, and use the instrument with the same effect as if this had been done before its execution. *The Bridgeport Bank v. The New York & New Haven R. R. Co.*, 30 Conn. 273.

Such, at all events, is the law of New York, and such, therefore, are the rights of a Connecticut citizen who receives such an assignment and power here, when the transfer office is in New York. *The Bridgeport Bank v. The New York & New Haven R. R. Co.*, 30 Conn. 275.

Any material alteration in a note or bill, made after it is complete, without the consent of the parties, releases them. *Mahaiwe Bank v. Douglass*, 31 Conn. 181.

If any custom prevails among banks of regarding erasures of printed matter in negotiable paper, as no evidence of an unauthorized alteration, when similar erasures of written matter would be so, it is not so ancient or general as to affect any who have not known of it or acquiesced in it. *Mahaiwe Bank v. Douglass*, 31 Conn. 182.

A material alteration was made in a note by the payee in favor of the maker, and in order to avoid a supposed illegality in its provisions. Held, that equity would compel the payment of the note altered. *Little v. Fowler*, 1 Root, 94.

MASSACHUSETTS.

(First paragraph.) *Osgood v. Stevenson*, 143 Mass. 399; *Waring v. Williams*, 8 Pick. 322; *Wheelock v. Freeman*, 13 Pick. 165; *Davis v. Jenney*, 1 Metc. 221; *Boston v. Benson*, 12 Cush. 61; *Agawam Bank v. Sears*, 4 Gray, 95; *Doane v. Eldridge*, 16 Gray, 255; *Fay v. Smith*, 1 Allen, 477; *Stoddard v. Penniman*, 108 Mass. 366; *Draper v. Wood*, 112 Mass. 315; *Stoddard v. Penniman*, 113 Mass. 386; *Cape Ann Nat. Bank v. Burns*, 129 Mass. 596.

Many authorities hold that there is no presumption as to when alterations are made, but that the whole question is for the jury, and the plaintiff must establish his case and show that the instrument in question is the defendant's. *Wilde v. Armsby*, 6 Cush. 314, 318; *Simpson v. Davis*, 119 Mass. 269, 270, 20 Am. Rep. 324.

Immaterial alterations.—*Church v. Fowle*, 142 Mass. 12; *Brown v. Pinkham*, 18 Pick. 172; *Vose v. Dolan*, 108 Mass. 155, 11 Am. Rep. 333; *Hatch v. Hatch*, 9 Mass. 307; *Smith v. Crooker*, 5 Mass. 538; *Com. v. Emigrant Sav. Bank*, 98 Mass. 12; *Hunt v. Adams*, 6 Mass. 519; *Ames v. Colburn*, 11 Gray, 390.

CHAPTER XII.

*OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE,
AND OF THE MODIFICATION AND INTERPRETATION OF
DOCUMENTARY BY ORAL EVIDENCE.*

ARTICLE 90.*

EVIDENCE OF TERMS OF CONTRACTS, GRANTS, AND OTHER
DISPOSITIONS OF PROPERTY REDUCED TO A DOCUMENT-
ARY FORM.

WHEN any judgment of any Court or any other judicial or official proceeding, or any contract or grant, or any other disposition of property, has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceeding, or of the terms of such contract, grant, or other disposition of property, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.¹ Nor may the contents of any such document be contradicted, altered, added to, or varied by oral evidence.

Provided that any of the following matters may be proved—

(1) Fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact

* See Note XXXII.

¹ Illustrations (a) and (b).

that it is wrongly dated,² want or failure of consideration, or mistake in fact or law, or any other matter which, if proved, would produce any effect upon the validity of any document, or of any part of it, or which would entitle any person to any judgment, decree, or order relating thereto.³

(2) The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the Court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them.⁴

(3) The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property.⁵

(4) The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant, or disposition of property, provided that such agreement is not invalid under the Statute of Frauds, or otherwise.⁶

(5) Any usage or custom by which incidents not expressly mentioned in any contract are annexed to contracts of that description; unless the annexing of such incident to such contract would be repugnant to or inconsistent with the express terms of the contract.⁷

² *Reffell v. Reffell*, 1866, L. R. 1 P. & D. 139. Mr. Starkie extends this to mistakes in some other formal particulars. 3 Star. Ev. 787-8.

³ Illustration (c).

⁴ Illustrations (d) and (e).

⁵ Illustrations (f) and (g).

⁶ Illustration (h).

⁷ *Wigglesworth v. Dallison*, 1779, and note thereto, S. L. C. 528-

Oral evidence of a transaction is not excluded by the fact that a documentary memorandum of it was made, if such memorandum was not intended to have legal effect as a contract, or other disposition of property.⁸

Oral evidence of the existence of a legal relation is not excluded by the fact that it has been created by a document, when the fact to be proved is the existence of the relationship itself, and not the terms on which it was established or is carried on.⁹

The fact that a person holds a public office need not be proved by the production of his written or sealed appointment thereto, if he is shown to have acted on it.¹⁰

Illustrations.

(a) A policy of insurance is effected on goods "in ships from Surinam to London." The goods are shipped in a particular ship, which is lost.

The fact that that particular ship was orally excepted from the policy cannot be proved.¹¹

(b) An estate called Gotton Farm is conveyed by a deed which describes it as consisting of the particulars described in the first division of a schedule and delineated in a plan on the margin of the schedule.

Evidence cannot be given to show that a close not mentioned in the schedule or delineated in the plan was always treated as part of Gotton Farm, and was intended to be conveyed by the deed.¹²

(c) A institutes a suit against B for the specific performance of a

560. A late case is *Johnson v. Raylton*, 1881, 7 Q. B. D. 438, in which it was held that evidence was admissible of a custom that in a contract with a manufacturer for iron plates he warranted them to be of his own make.

⁸ Illustration (i).

⁹ Illustration (j).

¹⁰ See authorities collected in 1 Ph. Ev. 449-50; Taylor, s. 171.

¹¹ *Weston v. Emes*, 1808, 1 Tau. 115.

¹² *Barton v. Dawes*, 1850, 10 C. B. 261-265.

contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake.

A may prove that such a mistake was made as would entitle him to have the contract reformed.¹³

(d) A lets land to B, and they agree that a lease shall be given by A to B.

Before the lease is given, B tells A that he will not sign it unless A promises to destroy the rabbits. A does promise. The lease is afterwards granted, and reserves sporting rights to A, but does not mention the destruction of the rabbits. B may prove A's oral agreement as to the rabbits.¹⁴

(e) A and B agree orally that B shall take up an acceptance of A's, and that thereupon A and B shall make a written agreement for the sale of certain furniture by A to B. B does not take up the acceptance. A may prove the oral agreement that he should do so.¹⁵

(f) A and B enter into a written agreement for the sale of an interest in a patent, and at the same time agree orally that the agreement shall not come into force unless C approves of it. C does not approve. The party interested may show this.¹⁶

(g) A, a farmer, agrees in writing to transfer to B, another farmer, a farm which A holds of C. It is orally agreed that the agreement is to be conditional on C's consent. B sues A for not transferring the farm. A may prove the condition as to C's consent and the fact that he does not consent.¹⁷

(h) A agrees in writing to sell B 14 lots of freehold land and make a good title to each of them. Afterwards B consents to take one lot though the title is bad. Apart from the Statute of Frauds this agreement might be proved.¹⁸

(i) A sells B a horse, and orally warrants him quiet in harness. A also gives B a paper in these words: "Bought of A a horse for 17l. 2s. 6d."

B may prove the oral warranty.¹⁹

¹³ Story's 'Equity Jurisprudence,' chap. v. ss. 153-162.

¹⁴ *Morgan v. Griffiths*, 1871, L. R. 6 Ex. 70; and see *Angell v. Duke*, L. R. 1875, 10 Q. B. 174.

¹⁵ *Lindley v. Lacey*, 1864, 17 C. B. (N. S.) 578.

¹⁶ *Pym v. Campbell*, 1856, 6 E. & B. 370.

¹⁷ *Wallis v. Littell*, 1861, 11 C. B. (N. S.) 369.

¹⁸ *Goss v. Lord Nugent*, 1833, 5 B. & Ad. 58, 65.

¹⁹ *Ailen v. Prink*, 1838, 4 M. & W. 140.

(j) The question is, whether A gained a settlement by occupying and paying rent for a tenement. The facts of occupation and payment of rent may be proved by oral evidence, although the contract is in writing.²⁰

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), sec. 85 *et seq.*, 275 *et seq.*; McKelvey on Evidence, pp. 366–373.

Fraud, etc.—*Martin v. Clark*, 8 R. I. 389, 5 Am. Rep. 586.

Writing not complete.—*Neal v. Flint*, 88 Me. 73.

CONNECTICUT.

The main rule.—*White Sewing Machine Co. v. Feeley*, 72 Conn. 184; *Hildreth v. Hartford, etc., Tramway Co.*, 73 Conn. 631.

Fraud, mistake, etc.—Sustaining text: *Brainerd v. Brainerd*, 15 Conn. 586; *Park Bros. & Co. v. Blodgett & Clapp Co.*, 64 Conn. 38; *Fox v. Tabel*, 66 Conn. 397; *Todd v. Munson*, 53 Conn. 589; *Felz v. Walker*, 49 Conn. 98.

The writing not a complete statement.—*Caulfield v. Hermann*, 64 Conn. 327; *Averill v. Sawyer*, 62 Conn. 568; *Pacific Iron Works v. Newhall*, 34 Conn. 76.

Condition precedent.—Sustaining text: *White Sewing Machine Co. v. Feeley*, 72 Conn. 184; *Atwater v. Hewitt*, 72 Conn. 238; *McFarland v. Sikes*, 54 Conn. 250; *Trumbull v. O'Hara*, 71 Conn. 172; *Burns & Smith Lumber Co. v. Doyle*, 71 Conn. 742; *Carter v. Bellamy*, Kirb. 291; *Herd v. Bissel*, 1 Root, 260; *Bull v. Talcot*, 2 Root, 120; *Converse v. Moulton*, 2 Root, 195; *Avery v. Chappel*, 6 Conn. 275; *Crocker v. Higgins*, 7 Conn. 349; *Hall v. Rand*, 8 Conn. 573; *Reading v. Weston*, 8 Conn. 121; *Jones v. Warner*, 11 Conn. 49; *Baldwin v. Carter*, 17 Conn. 205; *Beckley v. Munson*, 22 Conn. 312; *Clarke v. Tappin*, 32 Conn. 67; *Mead v. Strouse*, 41 Conn. 567; *Pierpont v. Longden*, 46 Conn. 499, 500; *Hotchkiss v. Higgins*, 52 Conn. 213; *Winchell v. Coney*, 54 Conn. 33; *West Haven Water Co. v. Redfield*, 58 Conn. 40; *King v. Killbride*, 58 Conn. 117; *Osborne v. Taylor*, 58 Conn. 441; *Beard v. Boylan*, 59 Conn. 187; *Stanton v. N. Y. & N. E. R. R. Co.*, 59 Conn. 288; *Butler v. Barnes*, 60 Conn. 186.

Subsequent agreement.—*West Haven Water Co. v. Redfield*, 58 Conn. 40.

²⁰ *R. v. Hull*, 1827, 7 B. & C. 611.

Parol evidence is admissible to identity of things. *Watson v. New Milford*, 72 Conn. 562.

Custom.—*Kilgore v. Bulkeley*, 14 Conn. 392; *Bank of New Milford v. New Milford*, 36 Conn. 100.

MASSACHUSETTS.

The main rule.—*Perry v. Bigelow*, 128 Mass. 129; *Bergin v. Williams*, 138 Mass. 544; *Colt v. Cone*, 107 Mass. 285; *Munde v. Lambie*, 122 Mass. 336; *Tower v. Richardson*, 6 Allen, 351; *Doyle v. Dixon*, 12 Allen, 576.

Fraud.—*Fletcher v. Willard*, 14 Pick. 464; *Case v. Gerrish*, 15 Pick. 49.

Condition precedent.—*Faunce v. State Ins. Co.*, 101 Mass. 279; *Wilson v. Powers*, 131 Mass. 539; *Whitaker v. Salisbury*, 15 Pick. 534.

Date.—*Bayley v. Taber*, 5 Mass. 286; *Orcutt v. Moore*, 134 Mass. 48; *Davis S. M. Co. v. Stone*, 131 Mass. 384.

Consideration.—Sustaining text: *Clapp v. Tirrell*, 20 Pick. 247; *Twomey v. Crowley*, 137 Mass. 184; *O'Connell v. Kelly*, 114 Mass. 97.

Writing not complete statement.—Sustaining text: *Durkin v. Cobleigh*, 156 Mass. 108, 32 Am. St. Rep. 436.

Subsequent agreement.—*Stearns v. Hall*, 9 Cush. 31; *Munroe v. Perkins*, 9 Pick. 298; *Shaffer v. Sawyer*, 123 Mass. 294.

ARTICLE 91.*

WHAT EVIDENCE MAY BE GIVEN FOR THE INTERPRETATION OF DOCUMENTS.

(1) Putting a construction upon a document means ascertaining the meaning of the signs or words made upon it, and their relation to facts.

(2) In order to ascertain the meaning of the signs and words made upon a document, oral evidence may be given of the meaning of illegible or not commonly intelligible

* See Note XXXIII.

characters, of foreign, obsolete, technical, local, and provincial expressions, of abbreviations, and of common words which, from the context, appear to have been used in a peculiar sense;²¹ but evidence may not be given to show that common words, the meaning of which is plain, and which do not appear from the context to have been used in a peculiar sense, were in fact so used.²²

(3) If the words of a document are so defective or ambiguous as to be unmeaning, no evidence can be given to show what the author of the document intended to say.²³

(4) In order to ascertain the relation of the words of a document to facts, every fact may be proved to which it refers, or may probably have been intended to refer,²⁴ or which identifies any person or thing mentioned in it.²⁵ Such facts are hereinafter called the circumstances of the case.²⁶

(5) If the words of a document have a proper legal meaning, and also a less proper meaning, they must be deemed to have their proper legal meaning, unless such a construction would be unmeaning in reference to the circumstances of the case, in which case they may be interpreted according to their less proper meaning.²⁷

²¹ Illustrations (a) (b) (c).

²² Illustration (a).

²³ Illustrations (e) and (f).

²⁴ See all the Illustrations.

²⁵ Illustration (g).

²⁶ As to proving facts showing the knowledge of the writer, and for an instance of a document which is not admissible for that purpose, see *Adie v. Clark*, 1876, 3 Ch. Div. 134, 142.

²⁷ Illustration (h).

(6) If the document has one distinct meaning in reference to the circumstances of the case, it must be construed accordingly, and evidence to show that the author intended to express some other meaning is not admissible.²⁸

(7) If the document applies in part but not with accuracy or not completely to the circumstances of the case, the Court may draw inferences from those circumstances as to the meaning of the document, whether there is more than one, or only one thing or person to whom or to which the inaccurate description may equally well apply. In such cases no evidence can be given of statements made by the author of the document as to his intentions in reference to the matter to which the document relates, though evidence may be given as to his circumstances, and as to his habitual use of language or names for particular persons or things.²⁹

(8) If the language of the document, though plain in itself, applies equally well to more objects than one, evidence may be given both of the circumstances of the case and of statements made by any party to the document as to his intentions in reference to the matter to which the document relates.³⁰

(9) If the document is of such a nature that the Court will presume that it was executed with any other than its apparent intention, evidence may be given to show that it was in fact executed with its apparent intention.³¹

²⁸ Illustration (i).

³⁰ Illustrations (n) (o).

²⁹ Illustrations (k) (l) (m).

³¹ Illustration (p).

Illustrations.

(a) A lease contains a covenant as to "ten thousand rabbits." Oral evidence to show that a thousand meant, in relation to rabbits, 1200, is admissible.³²

(b) A sells to B "1170 bales of gambier." Oral evidence is admissible to show that a "bale" of gambier is a package compressed, and weighting 2 cwt.³³

(c) A, a sculptor, leaves to B "all the marble in the yard, the tools in the shop, bankers, mod tools for carving." Evidence to show whether "mod" meant models, moulds, or modelling-tools, and to show what bankers are, may be given.³⁴

(d) Evidence may not be given to show that the word "boats," in a policy of insurance, means "boats not slung on the outside of the ship on the quarter."³⁵

(e) A leaves an estate to K, L, M, &c., by a will dated before 1838. Eight years afterwards A declares that by these letters he meant particular persons. Evidence of this declaration is not admissible. Proof that A was in the habit of calling a particular person M would have been admissible.³⁶

(f) A leaves a legacy to —. Evidence to show how the blank was intended to be filled is not admissible.³⁷

(g) Property was conveyed in trust in 1704 for the support of "Godly preachers of Christ's holy Gospel." Evidence may be given to show what class of ministers were at the time known by that name.³⁸

(h) A leaves property to his "children." If he has both legitimate and illegitimate children the whole of the property will go to the legitimate children. If he has only illegitimate children, the prop-

³² *Smith v. Wilson*, 1832, 3 B. & Ad. 728.

³³ *Gorrissen v. Perrin*, 1857, 2 C. B. (N. S.) 681.

³⁴ *Goblet v. Beechey*, 1831, 3 Sim. 24; 2 Russ. & Myl. 624.

³⁵ *Blackett v. Royal Exchange Co.*, 1832, 2 C. & J. 244.

³⁶ *Clayton v. Lord Nugent*, 1844, 13 M. & W. 200; see 207-8.

³⁷ *Baylis v. A. G.*, 1741, 2 Atk. 239. In *In re Bacon's Will*, *Camp v. Coe*, 1886, 31 Ch. Div. 460, blanks were left in a will, and parol evidence was admitted to rebut any presumption arising from them against the *primâ facie* claim of the executor to the residue undisposed of.

³⁸ *Shore v. Wilson*, 1842, 9 C. & F. 356, 365 *et seq.*

erty may go to them, if he cannot have intended to give it to unborn legitimate children.³⁹

(i) A testator leaves all his estates in the county of Limerick and city of Limerick to A. He had no estates in the county of Limerick, but he had estates in the county of Clare, of which the will did not dispose. Evidence cannot be given to show that the words "of Clare" had been erased from the draft by mistake, and so omitted from the will as executed.⁴⁰

(j) A leaves a legacy to "Mrs. and Miss Bowden." No such persons were living at the time when the legacy was made, but Mrs. Washburne, whose maiden name had been Bowden, was living, and had a daughter, and the testatrix used to call them Bowden. Evidence of these facts was admitted.⁴¹

(k) A devises land to John Hiscocks, the eldest son of John Hiscocks. John Hiscocks had two sons, Simon, his eldest, and John, his second son, who, however, was the eldest son by a second marriage. The circumstances of the family, but not the testator's declarations of intention, may be proved in order to show which of the two was intended.⁴²

(l) A devises property to Elizabeth, the natural daughter of B. B has a natural son John, and a legitimate daughter Elizabeth. The Court may infer from the circumstances under which the natural child was born, and from the testator's relationship to the putative father, that he meant to provide for John.⁴³

(m) A leaves a legacy to his niece, Elizabeth Stringer. At the date of the will he had no such niece, but he had a great-great-niece named Elizabeth Jane Stringer. The Court may infer from these circumstances that Elizabeth Jane Stringer was intended; but they may not refer to instructions given by the testator to his solicitor, showing that the legacy was meant for a niece, Elizabeth Stringer, who

³⁹ Wig. Ext. Ev. pp. 18 and 19, and note of cases.

⁴⁰ *Miller v. Travers*, 1832, 8 Bing. 244.

⁴¹ *Lee v. Pain*, 1845, 4 Hare, 251-3.

⁴² *Doe v. Hiscocks*, 1839, 5 M. & W. 363. Cf. *In re Fish, Ingram v. Rayner*, [1894], 2 Ch. D. 83, where F devised property to his niece, E W. He had no niece so named, but had two grand-nieces of that name, one legitimate, the other illegitimate: evidence of the surrounding circumstances tending to show that the illegitimate niece was meant was not admitted.

⁴³ *Ryall v. Hannam*, 1847, 10 Beav. 536.

had died before the date of the will, and that it was put into the will by a mistake on the part of the solicitor.⁴⁴

(n) A devises one house to George Gord the son of George Gord, another to George Gord the son of John Gord, and a third to George Gord the son of Gord. Evidence both of the circumstances and of the testator's statements of intention may be given to show which of the two George Gordes he meant.⁴⁵

(o) A appointed "Percival — of Brighton, Esquire, the father," one of his executors. Evidence of surrounding circumstances may be given to show who was meant, and (probably) evidence of statements of intention.⁴⁶

(p) A leaves two legacies of the same amount to B, assigning the same motive for each legacy, one being given in his will, the other in a codicil. The Court presumes that they are not meant to be cumulative, but the legatee may show, either by proof of surrounding circumstances, or of declarations by the testator that they were.⁴⁷

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), sec. 275 *et seq.*; 17 Am. & Eng. Encyclopædia of Law (2d ed.), p. 1 *et seq.*; 1st ed., vol. 17, p. 419 *et seq.*

Actual intention.—The actual intention cannot be shown by parol evidence. *Pingry v. Watkins*, 17 Vt. 379.

CONNECTICUT.

Identifying persons.—E W and E W, junior, father and son, lived in the same town. The latter bought a piece of land, and received a deed of it, drawn to E W. Held, that he could show that it was intended to be made to himself—E W, junior—both be-

⁴⁴ *Stringer v. Gardiner*, 1859, 27 Beav. 35; 4 De G. & J. 468.

⁴⁵ *Doe v. Needs*, 1836, 2 M. & W. 129.

⁴⁶ *In the goods of de Rosaz*, 1877, L. R. 2 P. D. 66.

⁴⁷ *Per Leach, V.C. in Hurst v. Leach*, 1821, 5 Madd. 351, 360–1. The rule in this case was vindicated, and a number of other cases both before and after it were elaborately considered by Lord St. Leonards, when Chancellor of Ireland, in *Hall v. Hall*, 1841, 1 Dru. & War. 94, 111–133. See, too, *Jenner v. Hinch*, 1879, 5 Prob. Div. 106.

cause the ambiguity, arising by parol, could be explained by parol, and because the deed would otherwise be inoperative for want of delivery. *Coit v. Starkweather*, 8 Conn. 294.

Identifying things.—Sustaining text: *Watson v. New Milford*, 72 Conn. 565. Under the rule which admits parol evidence in cases of ambiguity, to aid in the construction of a will, it is necessary that the words of the will should describe accurately the subject or object of the gift, and that the parol evidence should go only to show which of certain properly-described subjects or objects was intended. *Fairfield v. Lawson*, 50 Conn. 510.

Defining terms.—The meaning of a term in a certain business may be shown by parol evidence. *Parker v. Selden*, 69 Conn. 552; *Fuller v. Metropolitan Life Ins. Co.*, 70 Conn. 647.

A party to a contract may show in what sense the parties used a certain term. *Parker v. Selden*, 69 Conn. 552.

Parol testimony is admissible to show the contemporaneous understanding of the parties of the meaning of the terms used. *In re Curtis-Castle Arbitration*, 64 Conn. 514.

The parties had entered into a written contract which provided that one of them should "work" a certain street, and the alleged breach of this agreement formed one of the claims submitted to the arbitrators. Held, that parol evidence was admissible to show the special meaning of this term as understood by the parties at the time of making the contract; and that such evidence was not limited to expert testimony. *In re Curtis-Castle Arbitration*, 64 Conn. 514, 515.

A note payable "in cotton yarn, at the wholesale factory prices," may be explained by evidence that, by the usage of manufacturers and dealers in cotton yarn, the term "wholesale factory prices" means a different scale of prices from the actual market wholesale prices. *Avery v. Stewart*, 2 Conn. 73.

In an action for breach of contract to purchase, it is competent to show the meaning of the phrase "spring shipment," as used and understood by the parties, but not that the parties by their conduct extended the time of performance through the entire summer. This latter would be an attempt to prove another contract than that alleged. *Parker v. Selden*, 69 Conn. 544.

Circumstances.—It is a familiar rule that a deed shall, if possible, be so construed as to effectuate the intention. In arriving at that intention it is always admissible to consider the situation of the parties and the circumstances, and every part of the writing

should be considered with the help of that evidence. *Bartholomew v. Muzzy*, 61 Conn. 393.

The defendant offered evidence of a conversation between the agent of the plaintiffs and himself before a certain written agreement was made, as to the kind and nature of employment to be given him under the agreement. Held, that, so far as the evidence went to contradict, add to or vary the written agreement it was inadmissible, but that it was admissible so far as it tended to show the surrounding circumstances at the time the agreement was made. *Excelsior Needle Co. v. Smith*, 61 Conn. 59.

Indefiniteness as to object intended.—Where the grantor in a deed described the premises as the farm on which he then dwelt, held, that parol evidence was admissible to show that at that time a certain parcel of land subsequently claimed by the grantee, as parcel of the farm, was uncultivated and uninclosed, and divided from the farm by a highway, and that the grantor ever retained the exclusive possession of it. *Doolittle v. Blakesley*, 4 Day, 272, 465. See *Bennett v. Pierce*, 28 Conn. 315.

More proper meaning of language.—*Hatch v. Douglas*, 48 Conn. 116, 40 Am. Rep. 154; *First Society v. Platt*, 12 Conn. 188; *Bulkley v. Chapman*, 9 Conn. 8; *Mullen v. Reed*, 64 Conn. 248; *Davies v. Davies*, 55 Conn. 319.

Ambiguities.—A latent ambiguity, that is, an ambiguity arising from extrinsic evidence, may be removed by extrinsic evidence. *Bristol v. Ontario Orphan Asylum*, 60 Conn. 477.

Parol evidence of intention is inadmissible to explain a contract ambiguous on its face. *Brown v. Slater*, 16 Conn. 196.

Practical construction.—The practical construction put upon the instrument by the parties may be shown. *Hamilton v. Dennison*, 56 Conn. 368; *Bray v. Loomer*, 61 Conn. 464; *Carney v. Hennessey*, 73 Conn., 49 Atl. 910.

MASSACHUSETTS.

Meaning of words, etc.—*Stoops v. Smith*, 100 Mass. 63, 66, 1 Am. Rep. 857.

Actual intention.—*Adams v. Morgan*, 150 Mass. 143.

Identifying persons and things.—*Aldrich v. Gaskill*, 10 Cush. 155; *Melcher v. Chase*, 105 Mass. 125; *Cleverly v. Cleverly*, 124 Mass. 314; *Bergin v. Williams*, 138 Mass. 544; *Scanlon v. Wright*, 13 Pick. 523; *Peabody v. Brown*, 10 Gray, 45; *Kingsford v. Hood*, 105 Mass. 495; *Simpson v. Dix*, 131 Mass. 179. .

Surrounding circumstances.—*Barry v. Bennett*, 7 Metc. 354; *Hurley v. Brown*, 98 Mass. 545; *Russell v. Lathrop*, 117 Mass. 424.

Practical construction.—The practical construction by the parties can be shown. *Howard v. Fessenden*, 14 Allen, 124; *Stevenson v. Erskine*, 99 Mass. 367; *Morris v. French*, 106 Mass. 326; *Lovejoy v. Lovett*, 124 Mass. 270.

ARTICLE 92.*

CASES TO WHICH ARTICLES 90 AND 91 DO NOT APPLY.

Articles 90 and 91 apply only to parties to documents, and their representatives in interest, and only to cases in which some civil right or civil liability is dependent upon the terms of a document in question. Any person other than a party to a document or his representative in interest may, notwithstanding the existence of any document, prove any fact which he is otherwise entitled to prove; and any party to any document or any representative in interest of any such party may prove any such fact for any purpose other than that of varying or altering any right or liability depending upon the terms of the document.

Illustrations.

(a) The question is, whether A, a pauper, is settled in the parish of Cheadle. A deed of conveyance to which A was a party is produced, purporting to convey land to A for a valuable consideration. The parish appealing against the order was allowed to call A as a witness to prove that no consideration passed.⁴⁸

(b) The question is, whether A obtained money from B under false pretences. The money was obtained as a premium for executing a deed of partnership, which deed stated a consideration other than the one which constituted the false pretence. B may give evidence of the

* See Note XXXIV. ⁴⁸ *R. v. Cheadle*, 1832, 3 B. & Ad. 833.

false pretence although he executed the deed mis-stating the consideration for the premium.⁴⁹

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), sec. 279; 17 Am. & Eng. Encyclopædia of Law (1st ed.), p. 453 *et seq.*

Strangers to instrument.—*Libby v. Mt. Monadnock, etc., Co.*, 47 N. H. 587, 32 Atl. 772; *Low v. Blodgett*, 21 N. H. 121; *Edgerly v. Emerson*, 23 N. H. 555, 55 Am. Dec. 207; *Furbush v. Goodwin*, 25 N. H. 425; *Woodman v. Eastman*, 10 N. H. 359; *Wilson v. Sullivan*, 58 N. H. 260; *Burnham v. Dorr*, 72 Me. 200. *Contra*, *McLellan v. Cumberland Bank*, 24 Me. 566; *Fonda v. Barton*, 63 Vt. 355, 22 Atl. 594.

CONNECTICUT.

Strangers to instrument.—*Adams v. Gray*, 8 Conn. 11, 20 Am. Dec. 82.

A stranger to a written instrument is not estopped by it from adducing parol testimony to prove a fraudulent operation of it upon his interests. *Reading v. Weston*, 8 Conn. 121.

The defendant offered to show an oral agreement between himself and the mortgagee, at the time the mortgage was given, that he, the defendant, should have the possession of the mortgaged premises until the mortgagee should demand possession. Held, that whatever force such agreement might have as between the immediate parties to it, the plaintiff, a stranger, could not be affected by it. *Downing v. Sullivan*, 64 Conn. 4.

A non-negotiable note of B and P, payable to J, was indorsed in full to H, who, after the death of P, brought suit upon it, in the name of J, against B. Under a plea of payment, held, that B might show, by the testimony of J, that, before the indorsement, H and S, being executors of P, had paid and taken up the note by substituting a new one of their own for the same amount, immediately after which the indorsement was made; for, even were this to be treated as inconsistent with the import of the indorsement, the defendant was a stranger to that contract, and could show its true character to prevent himself from being defrauded. *Johnson v. Blackman*, 11 Conn. 350.

⁴⁹ *R. v. Adamson*, 1843, 2 Moody, 286.

In an action for money paid, the plaintiff introduced, as part of his case, a bill of sale given by him to a third person. Held, that it could be met by proof of the plaintiff's declarations, made at the time of the sale, that he owned a larger interest in the goods sold than was stated in the writing. *Crowley v. Pendleton*, 46 Conn. 64.

The owner of a house, after having employed a broker to sell it, sold it himself to S, a person not sent by the broker. The broker, not being apprised of this, afterwards obtained an offer from B, of the same price for the property at which it had already been sold. This having been refused, and B having discovered the prior sale, he offered S \$1,000 for his bargain, which was accepted, and the conveyance was made by the owner directly to B. In a suit by the broker for his commission,—Held, that the owner was not precluded, by the term of the deed, from showing by parol that B really purchased of S. *Hungerford v. Hicks*, 39 Conn. 264.

MASSACHUSETTS.

Strangers to instrument.—*Shearer v. Babson*, 1 Allen, 486; *Carpenter v. King*, 9 Metc. 511.

PART III.

PRODUCTION AND EFFECT OF EVIDENCE.

CHAPTER XIII.*

BURDEN OF PROOF.

ARTICLE 93.†

HE WHO AFFIRMS MUST PROVE.

WHOEVER desires any Court to give judgment as to any legal right or liability dependent on the existence or non-existence of facts which he asserts or denies to exist, must prove that those facts do or do not exist.¹

AMERICAN NOTE.

(See also note to Article 95.)

GENERAL.

Authorities.—5 Am. & Eng. Encyclopædia of Law (2d ed.), p. 23 *et seq.*; 1 Greenleaf on Evidence (15th ed.), sec. 74; *Sawyer v. Child*, 68 Vt. 365 (quoting this article); *Buzzell v. Snell*, 25 N. H. 474; *Pennell v. Cummings*, 75 Me. 163.

CONNECTICUT.

Morehouse v. Remson, 59 Conn. 395.

Where by the pleadings the burden of proving any matter in issue is thrown upon the plaintiff, he must in the first instance

* See Note XXXV.

† See Note XXXVI.

¹ 1 Ph. Ev. 552; Taylor, s. 364 (from Greenleaf); Best, ss. 265-6; Starkie, 585-6.

introduce all the evidence upon which he relies to establish his claim. *Belden v. Allen*, 61 Conn. 174.

The term "burden of proof" is properly used only with reference to a party who is burdened with the necessity of proving some affirmative fact essential to his case. The burden of proof, in this sense, never shifts. The necessity of supplying prevailing evidence shifts from one side to the other as the evidence on one side or the other predominates; but this is a matter of sufficiency of proof, not of the burden of proof. *Pease v. Cole*, 53 Conn. 71.

In malicious prosecution the court charged that malice might be inferred from want of probable cause, but refused to charge that the burden of proof shifted from the plaintiff to the defendant. Held, correct. *Thompson v. Beacon Valley Rubber Co.*, 56 Conn. 499.

MASSACHUSETTS.

Quoting this article with approval: *Willett v. Rich*, 142 Mass. 357, 56 Am. Rep. 684. See also *Thornton v. Adams*, 11 Gray, 391; *New Bedford v. Hingham*, 117 Mass. 445; *Sohier v. Norwich Ins. Co.*, 11 Allen, 336; *Funcheon v. Harvey*, 119 Mass. 469; *Lathrop v. Grosvenor*, 10 Gray, 52; *Blake v. Mahan*, 2 Allen, 75; *Toll v. Merriam*, 93 Mass. 395; *Gray v. Gardner*, 17 Mass. 188; *Burnham v. Allen*, 1 Gray, 496.

ARTICLE 94.*

PRESUMPTION OF INNOCENCE.

If the commission of a crime is directly in issue in any proceeding, criminal or civil, it must be proved beyond reasonable doubt.

The burden of proving that any person has been guilty of a crime or wrongful act is on the person who asserts it, whether the commission of such act is or is not directly in issue in the action.

* See Note XXXVI.

Illustrations.

(a) A sues B on a policy of fire insurance. B pleads that A burnt down the house insured. B must prove his plea as fully as if A were being prosecuted for arson.²

(b) A sues B for damage done to A's ship by inflammable matter loaded thereon by B without notice to A's captain. A must prove the absence of notice.³

(c) The question in 1819 is, whether A is settled in the parish of a man to whom she was married in 1813. It is proved that in 1812 she was married to another person, who enlisted soon afterwards, went abroad on service, and had not been heard of afterwards. The burden of proving that the first husband was alive at the time of the second marriage is on the person who asserts it.⁴

AMERICAN NOTE.

GENERAL.

Authorities.—2 Wharton on Evidence, sec. 1246; 2 Greenleaf on Evidence (15th ed.), secs. 408, note, 426, notes; *Childs v. Merrill*, 66 Vt. 302.

The rule in this country generally is that where crime is imputed in a civil case it is enough to prove it by preponderance of evidence. 2 Greenleaf on Evidence (15th ed.), secs. 408, note, 426, notes; *Lindley v. Lindley*, 68 Vt. 421; *Nelson v. Pierce*, 18 R. I. 539.

CONNECTICUT.

Criminal cases.—*State v. Schweitzer*, 57 Conn. 539; *Hoyt v. Danbury*, 69 Conn. 348.

The presumption of innocence casts the burden of proving guilt upon the State, but it does no more. While it calls for evidence from the State, it is not itself evidence for the accused. *State v. Smith*, 65 Conn. 283.

The court, where no requests were made by the prisoner, charged that it was incumbent upon the State to satisfy the jury beyond a reasonable doubt of the guilt of the accused, but omitted to say that the accused was presumed to be innocent until proven guilty,

² *Thurtell v. Beaumont*, 1823, 1 Bing. 339.

³ *Williams v. East India Co.*, 1802, 3 Ea. 192, 198-9.

⁴ *R. v. Twyning*, 1819, 2 B. & Ald. 386.

and omitted also to define "reasonable doubt." Held, that the defendant had no just ground for complaint. *State v. Smith*, 65 Conn. 283.

Where a husband is charged with cruelty or violence towards his wife, there is a legal presumption of his innocence, arising from their relation, and the mutual affection by which it is commonly accompanied. *State v. Green*, 35 Conn. 205.

Civil cases.—In civil cases the verdict should be determined by the mere preponderance of evidence, even though the conclusion imputes to the defendant the guilt of a felony. *Mead v. Husted*, 52 Conn. 56.

In an action brought on the statute to recover treble value for property feloniously taken, the court below held, that it was not enough for the plaintiff to produce evidence sufficient for a recovery in an ordinary civil action, but that he was bound to prove the felonious taking "beyond a reasonable doubt, in the same manner as in a criminal prosecution." Upon motion of the plaintiff, a new trial was granted. *Munson v. Atwood*, 30 Conn. 103-107.

MASSACHUSETTS.

Criminal cases.—*Com. v. Goodwin*, 14 Gray, 55; *Com. v. Kimball*, 24 Pick. 366; *Com. v. Hardiman*, 9 Gray, 136; *Com. v. McKie*, 1 Gray, 61.

Civil cases.—Mere preponderance of evidence is enough, even if a crime is charged. *Roberge v. Burnham*, 124 Mass. 277.

Crime not in issue.—(Last paragraph of text.) *Davis v. Davis*, 123 Mass. 590.

ARTICLE 95.

ON WHOM THE GENERAL BURDEN OF PROOF LIES.

The burden of proof in any proceeding lies at first on that party against whom the judgment of the Court would be given if no evidence at all were produced on either side, regard being had to any presumption which may appear upon the pleadings. As the proceeding goes on, the burden of proof may be shifted from the party on whom it rested at

first by his proving facts which raise a presumption in his favour.⁵

Where there are conflicting presumptions, the case is the same as if there were conflicting evidence.⁶

Illustrations.

(a) It appears upon the pleadings that A is indorsee of a bill of exchange. The presumption is that the indorsement was for value, and the party interested in denying this must prove it.⁷

(b) A, a married woman, is accused of theft and pleads not guilty.

The burden of proof is on the prosecution. She is shown to have been in possession of the stolen goods soon after the theft. The burden of proof is shifted to A. She shows that she stole them in the presence of her husband. The burden of proving that she was not coerced by him is shifted to the prosecutor.⁸

(c) A is indicted for bigamy. On proof by the prosecution of the first marriage, A proves that at the time he was a minor. This throws on the prosecution the burden of proving the consent of A's parents.⁹

(d) A deed of gift is shown to have been made by a client to his solicitor. The burden of proving that the transaction was in good faith is on the solicitor.¹⁰

(e) It is shown that a hedge stands on A's land. The burden of proving that the ditch adjacent to it was not A's also is on the person who denies that the ditch belongs to A.¹¹

(f) A proves that he received the rent of land. The presumption is, that he is owner in fee simple, and the burden of proof is on the person who denies it.¹²

⁵ 1 Ph. Ev. 552; Taylor, ss. 365, 366; Starkie, 586-7 & 748; Best, s. 268; and see *Abrath v. N. E. Ry.*, 1883, 11 Q. B. D. 440, especially the judgment of Bowen, L.J., 455-462.

⁶ See Illustration (i).

⁷ *Mills v. Barber*, 1836, 1 M. & W. 425.

⁸ 1 Russ. Cri. 146.

⁹ *R. v. Butler*, 1803, 1 R. & R. 61.

¹⁰ 1 Story, Eq. Juris., s. 310, n. 1. Quoting *Hunter v. Atkins*, 1832, 3 M. & K. 113.

¹¹ *Guy v. West*, 1808, Selw. N. P. 1244.

¹² *Doe v. Coulthred*, 1837, 7 A. & E. 235.

(g) A finds a jewel mounted in a socket, and gives it to B to look at. B keeps it, and refuses to produce it on notice, but returns the socket. The burden of proving that it is not as valuable a stone of the kind as would go into the socket is on B.¹³

(h) A sues B on a policy of insurance, and shows that the vessel insured went to sea, and that after a reasonable time no tidings of her have been received, but that her loss had been rumoured. The burden of proving that she has not foundered is on B.¹⁴

(i) Z in 1864 married A. In 1868 he was convicted of bigamy in having in 1868 married B during the life of A. In 1879 he married C. In 1880, C being alive, he married D, and was prosecuted for bigamy in marrying D in the lifetime of C. The prisoner on his second trial proved the first conviction, thereby proving that A was living in 1868. No further evidence was given. A's being alive in 1868 raises a presumption that she was living in 1879. Z's marriage to C in 1879 being presumably innocent, raises a presumption that A was then dead. The inference ought to have been left to the jury.¹⁵

AMERICAN NOTE.

(See also note to Article 93.)

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), sec. 74, and notes; 5 Am. & Eng. Encyclopædia of Law (2d ed.), p. 21 *et seq.*

The burden of proof does not shift; the weight of evidence does. *Tarbox v. Eastern Steamboat Co.*, 50 Me. 339.

CONNECTICUT.

The term "burden of proof" is used in two senses, viz., to indicate the burden of going forward if the allegations of the pleader be met by a traverse, and to denote the duty to meet and rebut some pieces of evidence introduced by the adverse party by proof to overbear it in the mind of the trier. Taking the term in the former sense, the burden of proof never shifts. *Baxter v. Camp*, 71 Conn. 252; *Miles's Appeal*, 68 Conn. 242-244.

The term "burden of proof" is properly used only with reference to a party who is burdened with the necessity of proving some affirmative fact essential to his case. The burden of proof, in this

¹³ *Armoury v. Delamirie*, 1721, 1 S. L. C. 353.

¹⁴ *Koster v. Reed*, 1826, 6 B. & C. 19.

¹⁵ *R. v. Willshire*, 1881, 6 Q. B. D. 366.

sense, never shifts. The necessity of supplying prevailing evidence shifts from one side to the other as the evidence on one side or the other predominates; but this is a matter of sufficiency of proof, not of the burden of proof. *Pease v. Cole*, 53 Conn. 71.

In malicious prosecution the court charged that malice might be inferred from want of probable cause, but refused to charge that the burden of proof shifted from the plaintiff to the defendant. Held, correct. *Thompson v. Beacon Valley Rubber Co.*, 56 Conn. 499.

MASSACHUSETTS.

The burden of proof does not shift; the weight of evidence does. *Central Bridge v. Butler*, 2 Gray, 130; *Phillips v. Ford*, 9 Pick. 39; *Powers v. Russell*, 13 Pick. 69; *Starratt v. Mullen*, 148 Mass. 570.

ARTICLE 96.

BURDEN OF PROOF AS TO PARTICULAR FACT.

The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the burden of proving the fact shall lie on any particular person;¹⁶ but the burden may in the course of a case be shifted from one side to the other, and in considering the amount of evidence necessary to shift the burden of proof the Court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively.

Illustrations.

(a) A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission.

B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

¹⁶ For instances of such provisions, see Taylor, s. 372, n. 2.

(b) A, a shipowner, sues B, an underwriter, on a policy of insurance on a ship. B alleges that A knew of and concealed from B material facts. B must give enough evidence to throw upon A the burden of disproving his knowledge; but slight evidence will suffice for this purpose.¹⁷

(c) In an action for malicious prosecution the plaintiff must prove (1) his innocence; (2) want of reasonable and probable cause for the prosecution; (3) malice or indirect motive; and he must prove all that is necessary to establish each proposition sufficiently to throw the burden of disproving that proposition on the other side.¹⁸

(d) In actions for penalties under the old game laws, though the plaintiff had to aver that the defendant was not duly qualified, and was obliged to give general evidence that he was not, the burden of proving any definite qualification was on the defendant.¹⁹

AMERICAN NOTE.

(As to the shifting of the burden of proof, see note to Articles 93 and 95.)

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), secs. 78, 79 *et seq.*; 5 Am. & Eng. Encyclopædia of Law (2d ed.), p. 21.

CONNECTICUT.

First paragraph: *Stiles v. Homer*, 21 Conn. 512; *Fox v. Glastenbury*, 29 Conn. 209; *Ryan v. Bristol*, 63 Conn. 31, 37; *Thompson v. Beacon Falls Rubber Co.*, 56 Conn. 499.

MASSACHUSETTS.

Mulcahy v. Fenwick, 161 Mass. 164; *Barton v. Kirk*, 157 Mass. 303; *Parker v. Floyd*, 12 Cush. 230; *Lothrop v. Otis*, 7 Allen, 435.

¹⁷ *Elkin v. Janson*, 1845, 13 M. & W. 655. See, especially, the judgment of Aldersen, B., 663–6.

¹⁸ *Abrath v. North Eastern Railway*, 1883, 11 Q. B. D. 440.

¹⁹ 1 Ph. Ev. 556, and cases there quoted: but now see 42 & 43 Vict. c. 49, s. 39. The illustration is founded more particularly on *R. v. Jarvis*, in a note to *R. v. Stone*, 1757, 1 Ea. 639, where Lord Mansfield's language appears to imply what is stated above.

ARTICLE 97.

BURDEN OF PROVING FACT TO BE PROVED TO MAKE
EVIDENCE ADMISSIBLE.

The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustrations.

(a) A wishes to prove a dying declaration by B.

A must prove B's death, and the fact that he had given up all hope of life when he made the statement.

(b) A wishes to prove, by secondary evidence, the contents of a lost document.

A must prove that the document has been lost.

AMERICAN NOTE.

GENERAL.

Authority.—*State v. Thibau*, 30 Vt. 100.

CONNECTICUT.

State v. Swift, 57 Conn. 505, 506.

MASSACHUSETTS.

Com. v. Brown, 14 Gray, 419; *Com. v. Waterman*, 122 Mass. 43; *Same v. Ratcliffe*, 130 Mass. 36.

ARTICLE 97A.

BURDEN OF PROOF WHEN PARTIES STAND IN A FIDUCIARY
RELATION.

When persons stand in a relation to each other of such a nature that the one reposes confidence in the other, or is placed by circumstances under his authority, control or

influence, when the question is as to the validity of any transaction between them from which the person in whom confidence is reposed or in whom authority or influence is vested derives advantage, the burden of proving that the confidence, authority or influence was not abused, and that the transaction was in good faith and valid, is on the person in whom such confidence or authority or influence is vested, and the nature and amount of the evidence required for this purpose depends upon the nature of the confidence or authority, and on the character of the transaction.²⁰

AMERICAN NOTE.

GENERAL.

Authorities.—27 Am. & Eng. Encyclopædia of Law (1st ed.), p. 452 *et seq.*; Pomeroy's Equity Jurisprudence, secs. 943-963; *Burnham v. Heselton*, 82 Me. 495; *Whipple v. Barton*, 63 N. H. 613.

CONNECTICUT.

Sustaining text: *St. Leger's Appeal*, 34 Conn. 450; *Livingston's Appeal*, 63 Conn. 78; *Richmond's Appeal*, 59 Conn. 226.

Where a person stands in a relation of special confidence towards another and has with him some transaction from which he derives benefit, such transaction will not be sustained in equity unless it was fair in itself and its nature and effect fully understood. *Nichols v. McCarthy*, 53 Conn. 318.

And the burden of proof is on the person claiming the benefit of the transaction to show these facts. *Nichols v. McCarthy*, 53 Conn. 323.

²⁰ See Story's 'Equity,' para. 307 and following. Also Taylor, s. 151 and following. The illustrations of the principle are innumerable, and very various.

CHAPTER XIV.

ON PRESUMPTIONS AND ESTOPPELS.*

ARTICLE 98.

PRESUMPTION OF LEGITIMACY.

THE fact that any person was born during the continuance of a valid marriage between his mother and any man, or within such a time after the dissolution thereof and before the celebration of another valid marriage, that his mother's husband could have been his father, is conclusive proof that he is the legitimate child of his mother's husband, unless it can be shown—

either that his mother and her husband had no access to each other at any time when he could have been begotten, regard being had both to the date of the birth and to the physical condition of the husband,

or that the circumstances of their access (if any) were such as to render it highly improbable that sexual intercourse took place between them when it occurred.

Neither the mother nor the husband is a competent witness as to the fact of their having or not having had sexual intercourse with each other (unless the proceedings in the course of which the question arises are proceedings instituted in consequence of adultery¹), nor are any declarations

* See Note XXXV.

1 32 & 33 Vict. c. 68, s. 3.

by them upon that subject deemed to be relevant facts when the legitimacy of the woman's child is in question, whether the mother or her husband can be called as a witness or not, provided that in applications for affiliation orders when proof has been given of the non-access of the husband at any time when his wife's child could have been begotten, the wife may give evidence as to the person by whom it was begotten.² Letters written by the mother may, as part of the *res gestæ*, be admissible evidence to show illegitimacy, though the mother could not be called as a witness to prove the statements contained in such letters.³

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), secs. 28, 344; vol. 2, secs. 150–153; *Grant v. Mitchell*, 83 Me. 23; *Pittsford v. Chittenden*, 58 Vt. 69.

MASSACHUSETTS.

Sullivan v. Kelly, 3 Allen, 148, 150; *Phillips v. Allen*, 2 Allen, 453; *Abington v. Duxbury*, 105 Mass. 287; *Bowers v. Wood*, 143 Mass. 182.

² *R. v. Luffe*, 1807, 8 Ea. 190, at p. 207; *Cope v. Cope*, 1833, 1 Mo. & Ro. 269 and at p. 273; *Legge v. Edmonds*, 1856, 25 L. J. Eq. 125, see p. 135; *R. v. Mansfield*, 1841, 1 Q. B. 444; *Morris v. Davies*, 1825, 3 C. & P. 215. See, as an illustration of these principles, *Haues v. Draeger*, 1883, 23 Ch. Div. 173. I am not aware of any decision as to the paternity of a child born say six months after the death of one husband, and three months after the mother's marriage to another husband. Amongst common soldiers in India such a question might easily arise. The rule in European regiments is that a widow not remarried within the year (it used to be six months) must leave the regiment; the result was and is that widowhoods are usually very short.

³ *Aylesford Peerage Case*, 1885, 11 App. Ca. 1, in which the general rule stated above is considered and affirmed.

ARTICLE 99. . .

PRESUMPTION OF DEATH FROM SEVEN YEARS' ABSENCE.

A person shown not to have been heard of for seven years by those (if any) who if he had been alive would naturally have heard of him, is presumed to be dead unless the circumstances of the case are such as to account for his not being heard of without assuming his death; but there is no presumption as to the time when he died, and the burden of proving his death at any particular time is upon the person who asserts it.⁴

There is no presumption as to the age at which a person died who is shown to have been alive at a given time, or as to the order in which two or more persons died who are shown to have died in the same accident, shipwreck, or battle.⁵

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), secs. 30, 41; McKelvey on Evidence, p. 67; *Johnson v. Merithew*, 80 Me. 111; *Winship v. Conner*, 42 N. H. 341.

⁴ *McMahon v. McElroy*, 1869, 5 Ir. Rep. Eq. 1; *Hopewell v. De Pinna*, 1809, 2 Camp. 113; *Nepean v. Doe*, 1837, 2 S. L. C. 542, 632; *Nepean v. Knight*, 2 M. & W. 1837, 894, 912; *R. v. Lumley*, 1869, 1 C. C. R. 196; and see the caution of Lord Denman in *R. v. Harborne*, 1835, 2 A. & E. at p. 544. All the cases are collected and considered in *In re Phene's Trust*, 1869, 5 Ch. App. 139. The doctrine is also much discussed in *Prudential Assurance Company v. Edmonds*, 1877, 2 App. Cas. 487. The principle is stated to the same effect as in the text in *Re Corbishley's Trusts*, 1880, 14 Ch. Div. 846.

⁵ *Wing v. Angrave*, 1860, 8 H. L. C. 183, 198; and see authorities in last note.

CONNECTICUT.

Where the death of a person is presumed from his absence for seven years unheard of, there is no presumption that he died before the end of the seven years. *Cone v. Dunham*, 59 Conn. 160.

A disappeared two years before the death of D, and was never heard from. Held, that there was no presumption that he was not living during the six months limited soon after D's death for the presentation of claims against his estate. *Cone v. Dunham*, 59 Conn. 160.

MASSACHUSETTS.

(First paragraph of text.) *Stockbridge's Case*, 145 Mass. 517

Same calamity.—Sustaining last paragraph of text: *Coy v. Leach*, 8 Metc. 371, 372, 41 Am. Dec. 518; *Fuller v. Linzee*, 135 Mass. 468.

Bigamy.—As to effect of presumption in bigamy prosecution, see *Com. v. Mash*, 7 Metc. 472.

ARTICLE 100.

* PRESUMPTION OF LOST GRANT.

When it has been shown that any person has, for a long period of time, exercised any proprietary right which might have had a lawful origin by grant or license from the Crown or from a private person, and the exercise of which might and naturally would have been prevented by the persons interested if it had not had a lawful origin, there is a presumption that such right had a lawful origin and that it was created by a proper instrument which has been lost.

Illustrations.

(a) The question is, whether B is entitled to recover from A the possession of lands which A's father and mother successively occupied

* The subject of the doctrine of lost grants is much considered in *Angus v. Dalton*, 3 Q. B. D. 84, 1881, 6 App. Cas. 740.

from 1754 to 1792 or 1793, and which B had occupied (without title) from 1793 to 1809. The lands formed originally an encroachment on the Forest of Dean.

The undisturbed occupation for thirty-nine years raises a presumption of a grant from the Crown to A's father.⁶

(b) A fishing mill-dam was erected more than 110 years before 1861 in the River Derwent, in Cumberland (not being navigable at that place), and was used for more than sixty years before 1861 in the manner in which it was used in 1861. This raises a presumption that all the upper proprietors whose rights were injuriously affected by the dam had granted a right to erect it.⁷

(c) A borough corporation proved a prescriptive right to a several oyster fishery in a navigable tidal river. The free inhabitants of ancient tenements in the borough proved that from time immemorial and claiming as of right they had dredged for oysters, within the limits of the fishery, from Feb. 2 to Easter Eve in each year. The Court presumed a grant from the Crown to the corporation before legal memory of a several fishery, with a condition in it that the free inhabitants of ancient tenements in the borough should enjoy such a right.⁸

(d) A builds a windmill near B's land in 1829, and enjoys a free current of air to it over B's land as of right, and without interruption till 1860. This enjoyment raises no presumption of a grant by B of a right to such a current of air, as it would not be natural for B to interrupt it.⁹

(e) No length of enjoyment of water, percolating through underground undefined passages, raises a presumption of a grant from the owners of the ground under which the water so percolates of a right to the water.¹⁰

⁶ *Goodtitle v. Baldwin*, 1809, 11 Ea. 488. The presumption was rebutted in this case by an express provision of 20 Ch. II. c. 3, avoiding grants of the Forest of Dean.

⁷ *Leconfield v. Lonsdale*, 1870, L. R. 5 C. P. 657.

⁸ *Goodman v. Mayor of Saltash*, 1882, 7 App. Ch. 633 (see especially 650). Lord Blackburn dissented on the ground that such a grant would not have been legal (pp. 651-62). See same case in 1881, 7 Q. B. D. 106, and 1880, 5 C. P. D. 431, both of which were reversed.

⁹ *Webb v. Bird*, 1863, 13 C. B. (N. S.) 841.

¹⁰ *Chasemore v. Richards*, 1859, 7 H. L. C. 349.

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), secs. 45–47; 2 Wharton on Evidence, sec. 348 *et seq.*

CONNECTICUT.

Sumner v. Child, 2 Conn. 628; *Hart v. Chalker*, 5 Conn. 315.

Title to corporeal property cannot arise from the doctrine of implied grant. *Sumner v. Child*, 2 Conn. 628; *Price v. Lyon*, 14 Conn. 291.

MASSACHUSETTS.

Charles River Bridge v. Warren Bridge, 7 Pick. 344, 448, 449; *Gayetty v. Bethune*, 14 Mass. 49; *Coolidge v. Learned*, 8 Pick. 504.

ARTICLE 101.*

PRESUMPTION OF REGULARITY AND OF DEEDS TO COMPLETE
TITLE.

When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with.

When a person in possession of any property is shown to be entitled to the beneficial ownership thereof, there is a presumption that every instrument has been executed which it was the legal duty of his trustees to execute in order to perfect his title.¹¹

* See Note XXXVII., and *Macdougall v. Purrier*, 1830, 2 Dow. & Cl. 135, 433. *R. v. Cresswell*, 1876, 1 Q. B. D. (C. C. R.) 446, is a modern illustration of the effect of this presumption.

¹¹ *Doe d. Hammond v. Cooke*, 1829, 6 Bing. 174, 179.

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), secs. 20, 38, n., 40, n.; Perry on Trusts (4th ed.), sec. 349.

Regularity.—*State v. Potter*, 52 Vt. 33.

CONNECTICUT.

Regularity.—*State v. Main*, 69 Conn. 140, 144; *Brownell v. Palmer*, 22 Conn. 107, 119; *Ward v. Metropolitan Life Ins. Co.*, 66 Conn. 239; *Gregory v. Brooks*, 37 Conn. 372; *Perry v. Reynolds*, 53 Conn. 535; *Booth v. Booth*, 7 Conn. 367; *Coggill v. Botsford*, 29 Conn. 447.

MASSACHUSETTS.

Regularity.—*Platt v. Grover*, 136 Mass. 115.

ARTICLE 102.*

ESTOPPEL BY CONDUCT.

When one person by anything which he does or says, or abstains from doing or saying, intentionally causes or permits another person to believe a thing to be true, and to act upon such belief otherwise than but for that belief he would have acted, neither the person first mentioned nor his representative in interest is allowed, in any suit or proceeding between himself and such person or his representative in interest, to deny the truth of that thing.

When any person under a legal duty to any other person to conduct himself with reasonable caution in the transaction of any business neglects that duty, and when the person to whom the duty is owing alters his position for the worse

* See Note XXXVIII.

because he is misled as to the conduct of the negligent person by a fraud, of which such neglect is in the natural course of things the proximate cause, the negligent person is not permitted to deny that he acted in the manner in which the other person was led by such fraud to believe him to act.

Illustrations.

(a) A, the owner of machinery in B's possession, which is taken in execution by C, abstains from claiming it for some months, and converses with C's attorney without referring to his claim, and by these means impresses C with the belief that the machinery is B's. C sells the machinery. A is estopped from denying that it is B's.¹²

(b) A, a retiring partner of B, gives no notice to the customers of the firm that he is no longer B's partner. In an action by a customer, he cannot deny that he is B's partner.¹³

(c) A sues B for a wrongful imprisonment. The imprisonment was wrongful, if B had a certain original warrant; rightful, if he had only a copy. B had in fact a copy. He led A to believe that he had the original, though not with the intention that A should act otherwise than he actually did. B may show that he had only a copy and not the original.¹⁴

(d) A sells eighty quarters of barley to B, but does not specifically appropriate to B any quarters. B sells sixty of the eighty quarters to C. C informs A, who assents to the transfer. C being satisfied with this, says nothing further to B as to delivery. B becomes bankrupt. A cannot, in an action by C to recover the barley, deny that he holds for C on the ground that, for want of specific appropriation, no property passed to B.¹⁵

(e) A signs blank cheques and gives them to his wife to fill up as she wants money. A's wife fills up a cheque for £50 2s. so carelessly that room is left for the insertion of figures before the 50 and for the insertion of words before the "fifty." She then gives it to a clerk of A's to get it cashed. He wrote 3 before 50 and "three hundred and " before

¹² *Pickard v. Sears*, 1837, 6 A. & E. 469, 474.

¹³ (Per Parke, B.) *Freeman v. Cooke*, 1848, 2 Ex. 663.

¹⁴ *Howard v. Hudson*, 1853, 2 E. & B. 1.

¹⁵ *Knights v. Wiffen*, 1870, L. R. 5 Q. B. 660.

"fifty." A's banker pays the cheque so altered in good faith. A cannot recover against the banker.¹⁶

(f) A railway company negligently issues two delivery orders for the same wheat to A, who fraudulently raises money from B as upon two consignments of different lots of wheat. The Railway is liable to B for the amount which A fraudulently obtained by the company's negligence.¹⁷

(g) A carelessly leaves his door unlocked, whereby his goods are stolen. He is not estopped from denying the title of an innocent purchaser from the thief.¹⁸

AMERICAN NOTE.

GENERAL.

Authorities.—Bigelow on Estoppel, sec. 453 *et seq.*; 11 Am. & Eng. Encyclopædia of Law (2d ed.), p. 420 *et seq.*

Estoppel.—(First paragraph of text.) *Drew v. Kimball*, 43 N. H. 282, 80 Am. Dec. 163; *Horn v. Cole*, 51 N. H. 287; *Forsyth v. Day*, 46 Me. 176; *Wetherell v. Mar. Ins. Co.*, 49 Me. 200; *Allen v. Shaw*, 61 N. H. 95.

CONNECTICUT.

Estoppel.—(First paragraph of text.) *Canfield v. Gregory*, 66 Conn. 9, 17; *Chase's Appeal*, 57 Conn. 236; *Roe v. Jerome*, 18 Conn. 153; *Taylor v. Ely*, 25 Conn. 258; *Mitchell v. Leavitt*, 30 Conn. 590.

MASSACHUSETTS.

Estoppel.—(First paragraph of text.) *Carroll v. M. R. R. Co.*, 111 Mass. 1; *Zuchtman v. Roberts*, 109 Mass. 53, 54, 12 Am. Rep. 663; *Jackson v. Allen*, 120 Mass. 64; *Fall River Bank v. Buffinton*, 97 Mass. 500.

Fraud.—(Last paragraph of text.) *Putnam v. Sullivan*, 4 Mass. 45, 53, 3 Am. Dec. 206.

¹⁶ *Young v. Groate*, 1827, 4 Bing. 253.

¹⁷ *Coventry v. G. E. R.*, 1883, 11 Q. B. D. 776.

¹⁸ Per Blackburn, J., in *Swan v. N. B. Australasian Co.*, 1863, 2 H. & C. 181. See *Baxendale v. Bennett*, 1878, 3 Q. B. D. 525. The earlier cases on the subject are much discussed in *Jorden v. Money*, 1854, 5 H. L. Ca. 209-16, 249-257.

ARTICLE 103.

ESTOPPEL OF TENANT AND LICENSEE.

No tenant and no person claiming through any tenant of any land or hereditament of which he has been let into possession, or for which he has paid rent, is, till he has given up possession, permitted to deny that the landlord had, at the time when the tenant was let into possession or paid the rent, a title to such land or hereditament;¹⁹ and no person who came upon any land by the licence of the person in possession thereof, is, whilst he remains on it, permitted to deny that such person had a title to such possession at the time when such licence was given.²⁰

AMERICAN NOTE.

GENERAL.

Authorities.—18 Am. & Eng. Encyclopædia of Law (2d ed.), p. 411 *et seq.*; vol. 11, p. 440 *et seq.*; 1 Washburn on Real Property (5th ed.), pp. 588–601.

Tenant.—*Derrick v. Luddy*, 64 Vt. 462.

Licensee.—*Glynn v. George*, 20 N. H. 114.

CONNECTICUT.

Tenant.—Sustaining text: *Camp v. Camp*, 5 Conn. 300; *Magill v. Hinsdale*, 6 Conn. 469; *Holmes v. Kennedy*, 1 Root, 77.

In an action on a lease and for use and occupation, the plaintiff having failed in an attempt to prove a demise from himself to the defendant, held, that the defendant might show that he held and

¹⁹ *Doe v. Barton*, 1840, 11 A. & E. 307; *Doe v. Smyth*, 1815, 4 M. & S. 347; *Doe v. Pegg*, 1785, 1 T. R. 760 (note).

²⁰ *Doe v. Baytup*, 1835, 3 A. & E. 188.

occupied, not under the plaintiff, but under a third person. *Buell v. Cook*, 4 Conn. 245.

A lessee, who holds over after the end of the term, is estopped from setting up against the lessor that the title is in a stranger. *Holmes v. Kennedy*, 1 Root, 77.

A tenant, who holds over after the expiration of his lease, is not estopped from setting up a title in a third party, when sued by his former landlord in assumpsit for use and occupation. *New London v. Emerson*, 2 Root, 373.

A tenant may dispute his lessor's title, if he has yielded the possession in good faith, though without process of law, to one who had actually entered under a paramount title, coupled with a present right of entry. *Camp v. Scott*, 47 Conn. 369.

MASSACHUSETTS.

Tenant.—*Streeter v. Ilsley*, 147 Mass. 141; *Cobb v. Arnold*, 8 Metc. 398; *Bailey v. Kilburn*, 10 Metc. 176; *Oakes v. Munroe*, 8 Cush. 282; *Miller v. Lang*, 99 Mass. 13; *Hawes v. Shaw*, 100 Mass. 187; *Coburn v. Palmer*, 8 Cush. 124; *Blake v. Sanderson*, 1 Gray, 332; *Patten v. Deshon*, 1 Gray, 325; *Dunshee v. Grundy*, 15 Gray, 314; *Granger v. Parker*, 137 Mass. 228.

ARTICLE 104.

ESTOPPEL OF ACCEPTOR OF BILL OF EXCHANGE.

No acceptor of a bill of exchange is permitted to deny the signature of the drawer or his capacity to draw, or if the bill is payable to the order of the drawer, his capacity to endorse the bill, though he may deny the fact of the endorsement;²¹ nor if the bill be drawn by procuration, the authority of the agent, by whom it purports to be drawn, to draw in the name of the principal,²² though he may

²¹ *Garland v. Jacob*, 1873, L. R. 8 Ex. 216.

²² *Sanderson v. Collman*, 1842, 4 M. & G. 209.

deny his authority to endorse it.²³ If the bill is accepted in blank, the acceptor may not deny the fact that the drawer endorsed it.²⁴

AMERICAN NOTE.

GENERAL.

Authorities.—2 Greenleaf on Evidence (2d ed.), secs. 164, 165; 4 Am. & Eng. Encyclopædia of Law (2d ed.), p. 65 *et seq.*

CONNECTICUT.

See Negotiable Instruments Law, art. 5. (Acts of 1897, p. 790 *et seq.*).

MASSACHUSETTS.

National Bank v. Bangs, 106 Mass. 441.

ARTICLE 105.

ESTOPPEL OF BAILEE, AGENT, AND LICENSEE.

No bailee, agent, or licensee is permitted to deny that the bailor, principal, or licensor, by whom any goods were entrusted to any of them respectively was entitled to those goods at the time when they were so entrusted.

Provided that any such bailee, agent, or licensee may show that he was compelled to deliver up any such goods to some person who had a right to them as against his bailor, principal, or licensor, or that his bailor, principal, or licensor, wrongfully and without notice to the bailee, agent, or licensee, obtained the goods from a third person

²³ *Robinson v. Yarrow*, 1817, 7 Tau. 455.

²⁴ *L. & S. W. Bank v. Wentworth*, 1880, 5 Ex. D. 96.

who has claimed them from such bailee, agent, or licensee.²⁵

Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel, is conclusive proof of that shipment as against the master or other person signing the same, notwithstanding that some goods or some part thereof may not have been so shipped, unless such holder of the bill of lading had actual notice at the time of receiving the same that the goods had not been in fact laden on board, provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper or of the holder or some person under whom the holder holds.²⁶

AMERICAN NOTE.

GENERAL.

Authorities.—4 Am. & Eng. Encyclopædia of Law (2d ed.), p. 531 *et seq.*; vol. 3, p. 758 *et seq.*; vol. 1, p. 1091 *et seq.*

Bailee, etc.—(First paragraph of text.) *Roberts v. Noyes*, 76 Me. 590; *Singer Mfg. Co. v. King*, 14 R. I. 511; *Burton v. Wilkinson*, 18 Vt. 186, 46 Am. Dec. 145.

CONNECTICUT.

Bailee, etc.—(First paragraph of text.) *Staples v. Fillmore*, 43 Conn. 510.

²⁵ *Dixon v. Hammond*, 1819, 2 B. & A. 310; *Crossley v. Dixon*, 1863, 10 H. L. C. 293; *Gosling v. Birnie*, 1831, 7 Bing. 339; *Hardman v. Wilcock*, 1832 (?), 9 Bing. 382 (n.); *Biddle v. Bond*, 1865, 34 L. J. Q. B. 137; *Wilson v. Anderton*, 1830, 1 B. & Ad. 450. As to carriers, see *Sheridan v. New Quay*, 1858, 4 C. B. (N. S.) 618.

²⁶ 18 & 19 Vict. c. 111, s. 3.

Bill of lading.—(Last paragraph of text.) *Relyea v. New Haven Rolling Mill Co.*, 75 Fed. 420 (U. S. D. C., Dist. of Conn.).

MASSACHUSETTS.

Bailee, etc.—(First paragraph of text.) *Osgood v. Nichols*, 5 Gray, 420; *Bursley v. Hamilton*, 15 Pick. 40, 25 Am. Dec. 423.

Bill of lading.—(Last paragraph of text.) *Sears v. Wingate*, 3 Allen, 103.

CHAPTER XV.

OF THE COMPETENCY OF WITNESSES.*

ARTICLE 106.

WHO MAY TESTIFY.

ALL persons are competent to testify in all cases except as hereinafter excepted.

ARTICLE 107.†

WHAT WITNESSES ARE INCOMPETENT.

A witness is incompetent if in the opinion of the judge he is prevented by extreme youth, disease affecting his mind, or any other cause of the same kind, from recollecting the matter on which he is to testify, from understanding the questions put to him, from giving rational answers to those questions, or from knowing that he ought to speak the truth.

A witness unable to speak or hear is not incompetent, but may give his evidence by writing or by signs, or in any other manner in which he can make it intelligible; but such writing must be written and such signs made in open Court. Evidence so given is deemed to be oral evidence.

* See Note XXXIX.

† See Note XL. A witness under sentence of death was said to be incompetent in *R. v. Webb*, 1867, 11 Cox, 133, *sed quære*.

AMERICAN NOTE.

GENERAL.

Authorities.—1 Wharton on Evidence, secs. 398–403, 406, 407; 1 Greenleaf on Evidence (15th ed.), secs. 365–370.

Youth, etc.—(First paragraph of text.) *State v. Whittier*, 21 Me. 341, 347, 38 Am. Dec. 272; *Day v. Day*, 56 N. H. 316.

Persons of unsound mind may testify if, in fact, their understanding is sufficient to enable them to understand the oath and the questions. *Pease v. Burrowes*, 86 Me. 153, 176.

Interest.—The common-law disqualification because of interest is now removed, so far as the United States courts are concerned. U. S. Stat. at Large, vol. 20, p. 30; U. S. Rev. Stats., sec. 858.

Atheist.—At common law, one who does not believe in God is an incompetent witness. *Free v. Buckingham*, 59 N. H. 219.

Deaf and dumb witness.—*Quinn v. Halbert*, 57 Vt. 178.

CONNECTICUT.

Unsound mind.—The question whether a person offered as a witness is insane goes to his competency, and is a preliminary question to be decided by the court. *Holcomb v. Holcomb*, 28 Conn. 179.

Atheist.—An atheist is now a competent witness, but the fact may be shown. Gen. Stats., sec. 1098.

The opinions of one offered as a witness, as to the existence of a God and future accountability, must be derived from other witnesses, and he cannot himself be questioned upon them. *Atwood v. Welton*, 7 Conn. 73.

They may be proved from his declarations out of court. *Curtiss v. Strong*, 4 Day, 56; *Bow v. Parsons*, 1 Root, 481.

And in such a case the witness cannot be admitted to deny or explain such declarations; as it would be absurd to admit him to his oath, to learn from him whether he had the necessary qualifications for being admitted to his oath. *Curtiss v. Strong*, 4 Day, 56.

One who does not believe in the obligation of an oath, and a future state of rewards and punishments, or any accountability after death, is an incompetent witness. *Curtiss v. Strong*, 4 Day, 55, 4 Am. Dec. 179.

One who believes in a Supreme Being, and that men are punished in this life for their sins, but will all be made happy immediately after their death, is not a competent witness. *Atwood v. Welton*, 7 Conn. 73–79.

If a person believes in a God, the avenger of falsehood, and in a future state of rewards and punishments, he may be a witness and not otherwise. *Beardsley v. Foot*, 2 Root, 400.

Interest.—The common-law disqualification because of interest is now removed, but the fact of interest may be shown. Gen. Stats., sec. 1098.

Deaf and dumb witness.—*State v. De Wolf*, 8 Conn. 93, 97.

MASSACHUSETTS.

Youth.—*Com. v. Hutchinson*, 10 Mass. 225; *Com. v. Robinson*, 165 Mass. 426.

A child of five may be allowed to testify. *Com. v. Robinson*, 165 Mass. 426.

Unsound mind.—*Kendall v. May*, 10 Allen, 59; *Com. v. Lynes*, 142 Mass. 577; *Lewis v. Eagle Ins. Co.*, 10 Gray, 508.

Atheist.—At common law, one not believing in God was a competent witness. *Hunscom v. Hunscom*, 15 Mass. 184.

This is now changed by statute. Pub. Stats., chap. 169, sec. 17.

ARTICLE 108.*¹

COMPETENCY IN CRIMINAL CASES.

In criminal cases the accused person, and his or her wife or husband, and every person and the wife or husband of every person jointly indicted with him, and tried at the

* See Note XLI.

¹ The Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), by sect. 6, applies "to all criminal proceedings notwithstanding any enactment in force at the commencement of this Act," except proceedings for non-repair of highways, etc. (see *post*), and Court Martials, unless it is applied to them by general orders under the Naval Discipline Act, 1866 (29 & 30 Vict. c. 109), s. 65, or rules under the Army Act, 1882 (44 & 45 Vict. c. 58), s. 70. By sect. 7 it does not extend to Ireland. The enactments referred to in sect. 6 are contained in a number of Statutes, which, before 1898, made accused persons and their wives or husbands competent witnesses to different extents, in different specified cases. It

same time,² is incompetent to testify;³ except as herein-after mentioned.

Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, is a competent witness for the defence at every stage of the proceedings,⁴ whether the person so charged is charged solely or jointly with any other person; provided—

seems probable that subsequent Statute Law Revision Acts will repeal these enactments. Those now in force, and subject to this section, are The Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 34 (4); The Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 51 (4); The Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 21; The Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 11; The Threshing Machines Accidents Prevention Act, 1878 (41 & 42 Vict. c. 12), s. 3; The Army Act, 1882 (44 & 45 Vict. c. 58), s. 156 (3); The Explosives Act, 1883 (46 & 47 Vict. c. 3), s. 4 (2); The Married Women's Property Act, 1884 (47 & 48 Vict. c. 14), s. 1, as to which see *post* in the above article; The Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 20; The Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 10 (1); The Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 62 (2); The Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 9; The Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), s. 12; The Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 24; The Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 57 (3); The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 694; The Law of Distress Amendment Act, 1895 (58 & 59 Vict. c. 24), s. 5; The False Alarms of Fire Act, 1895 (58 & 59 Vict. c. 28), s. 2; The Factory and Workshop Act, 1895 (58 & 59 Vict. c. 37), s. 49; The Corrupt and Illegal Practices Prevention Act, 1895 (58 & 59 Vict. c. 40), s. 2; The Chaff-cutting Machines (Accidents) Act, 1897 (60 & 61 Vict. c. 60), s. 5.

² Not if they are tried separately; *Windsor v. R.*, 1866, L. R. 1 Q. B. 390; *Re Bradlaugh*, 15 Cox, 257.

³ *R. v. Payne*, 1872, 1 C. C. R. 349; and *R. v. Thompson*, 1872, *Ib.* 377.

⁴ This does not include proceedings before a Grand Jury; *R. v. Rhodes*, [1899], 1 Q. B. 77.

a person so charged shall not be called as a witness except upon his own application; and

the wife or husband of a person so charged cannot be called as a witness except upon the application of the person so charged.⁵

But the wife or husband of a person charged may be called as a witness either for the prosecution or defence, and without the consent of the person charged, if he is charged with—

(a) an offence under any enactment mentioned in the footnote hereto;⁶ or

(b) an offence as to which the wife or husband of the person charged may by common law be called as a witness without his or her consent, *i. e.* an offence consisting of any bodily injury or violence inflicted on his or her wife or husband.⁷

⁵ 61 & 62 Vict. c. 36, s. 1.

⁶ *Ib.* ss. 1 (c.), 4. The enactments referred to are set out in the Schedule to the Act, being The Vagrancy Act, 1824 (5 Geo. IV, c. 83), the enactment punishing a man for neglecting to maintain or deserting his wife or any of his family; The Poor Law (Scotland) Act, 1845 (8 & 9 Vict. c. 83), s. 80, relating to the like or neglect to maintain an illegitimate child; The Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), ss. 48–55, relating to rape, indecent assault on a female, abduction; The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 12 and 16, relating to offences by a married man or woman against his wife's or her husband's property, as to which see *supra*; The Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69); and The Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41).

⁷ 61 & 62 Vict. c. 36, ss. 1 (c.), 4; and as to the common law, see *R. v. Wakefield*, 1877, 2 Lew. 287; and *Reeve v. Wood*, 1864, 5 B. & S. 364. The common law has also been supposed to apply to treason, Taylor's Ev. s. 1372.

In any such criminal proceeding against a husband or a wife, as is authorised by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75, ss. 12 and 16), the husband and wife respectively are competent and admissible witnesses, and except when defendant compellable to give evidence.⁸

The following proceedings at law are not criminal within the meaning of this article:—

Trials of indictments for the non-repair of public highways or bridges, or for nuisances to any public highway, river, or bridge;⁹

Proceedings instituted for the purpose of trying civil rights only;⁹

Proceedings on the Revenue side of the Exchequer Division of the High Court of Justice.¹⁰

⁸ 47 Vict. c. 14, which must be read as subject to 61 & 62 Vict. c. 36, *ante*; and see the case of *R. v. Brittleton*, 1884, 12 Q. B. D. 266, which turns on the wording of the Act of 1882, and occasioned this enactment. The following doubt arises on the effect of this enactment. Does it mean (a) only that the wife is competent as against the husband, and the husband as against the wife, notwithstanding their marriage, or (b) that in such cases not only the prosecutor, though married to the prisoner, but the prisoner, though prisoner and though married, is to be competent, though the prisoner is not to be compellable? It is observable that the first "husband and wife" does not become "wife or husband" before the word "respectively," as would have been natural. It is also remarkable that in the Act of 1882 a criminal proceeding is described as "a remedy"—a very peculiar phrase.

⁹ 40 & 41 Vict. c. 14. The provisions of this Act are not affected by The Criminal Evidence Act, 1898, 61 & 62 Vict. c. 36, s. 6; see *ante*, p. 289, note 1.

¹⁰ 28 & 29 Vict. c. 104, s. 34.

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), secs. 330, 334–336, 362, 363; 1 Wharton's Criminal Evidence, sec. 421 *et seq.*

Now, by statute, in Maine, the husband or wife of the accused may testify as to everything except confidential communications. Rev. Stats., chap. 134, sec. 19.

CONNECTICUT.

Husband or wife.—*Lucas v. State*, 23 Conn. 19, 20; *State v. Gardner*, 1 Root, 485. See Gen. Stats., sec. 1623.

MASSACHUSETTS.

Accused.—The accused may testify if he wishes, but the fact that he does not take the stand may not create a presumption against him. Massachusetts Pub. Stats., chap. 169, sec. 18, par. 3. Nor can it be commented on. *Com. v. Scott*, 123 Mass. 239.

Persons jointly indicted.—Those jointly indicted may, by statute, now be witnesses for or against each other. *Com. v. Brown*, 130 Mass. 279.

A husband or wife may be now, by statute (chap. 169, sec. 18), but cannot be compelled to be a witness against the other. *Com. v. Moore*, 162 Mass. 441.

ARTICLE 109.

COMPETENCY IN PROCEEDINGS RELATING TO ADULTERY.

In proceedings instituted in consequence of adultery, the parties and their husbands and wives are competent witnesses, provided that no witness in any [? such] proceeding, whether a party to the suit or not, is liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness has already given evidence in the same proceeding in disproof of his or her alleged adultery.¹¹

¹¹ 32 & 33 Vict. c. 68, s. 3. The word "such" seems to have been omitted accidentally.

ARTICLE 110.

COMMUNICATIONS DURING MARRIAGE.

No husband is compellable to disclose any communication made to him by his wife during the marriage, and no wife is compellable to disclose any communication made to her by her husband during the marriage.¹²

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), sec. 254; McKelvey on Evidence, p. 288; *Campbell v. Chace*, 12 R. I. 333.

A husband or wife may not testify to conversations which are overheard by another. *Campbell v. Chace*, 12 R. I. 333.

CONNECTICUT.

Written communications overheard by a stranger are admissible. *State v. Hoyt*, 47 Conn. 518.

A wife may testify to private conversations, when the question arises upon the hearing of a claim in her favor against her husband's insolvent estate. *Spitz's Appeal*, 56 Conn. 187.

MASSACHUSETTS.

Sustaining text: *Litchfield v. Merritt*, 102 Mass. 520; *Dickerman v. Graves*, 6 Cush. 308, 53 Am. Dec. 41; *Brown v. Wood*, 121 Mass. 137; *Drew v. Tarbell*, 117 Mass. 90; *Com. v. Hayes*, 145 Mass. 289; *Com. v. Caponi*, 155 Mass. 534.

One who overhears may testify. *Com. v. Griffin*, 110 Mass. 181; *Lyon v. Prouty*, 154 Mass. 488.

¹² 16 & 17 Vict. c. 83, s. 3, and 61 & 62 Vict. c. 36, s. 1, subs. (d). It is doubtful whether this would apply to a widower or divorced person, questioned after the dissolution of the marriage as to what had been communicated to him whilst it lasted.

ARTICLE 111.*

JUDGES AND ADVOCATES PRIVILEGED AS TO CERTAIN
QUESTIONS.

It is doubtful whether a judge is compellable to testify as to anything which came to his knowledge in court as such judge.¹³ It seems that a barrister cannot be compelled to testify as to what he said in court in his character of a barrister.¹⁴

AMERICAN NOTE.

GENERAL.

Authorities.—1 Wharton on Evidence, sec. 600; 17 Am. & Eng. Encyclopædia of Law (2d ed.), p. 724 *et seq.*; Weeks on Attorneys (2d ed.), secs. 124, 125.

Judges.—A judge may refuse to testify, but may testify if he sees fit. *Welcome v. Batchelder*, 23 Me. 85.

Attorneys.—Generally now attorneys are competent witnesses. Weeks on Attorneys (2d ed.), secs. 124, 125.

CONNECTICUT.

Judges.—*Allen's Appeal*, 69 Conn. 709.

Whether to prove the points decided, the judge is a competent witness, *quære*. *Supples v. Cannon*, 44 Conn. 430, and reporter's note.

Justices of the peace may testify on appeal as to what took place before them. *State v. Duffy*, 57 Conn. 525.

Attorney.—*Carrington v. Holabird*, 17 Conn. 530.

MASSACHUSETTS.

Judges.—A judge may testify. *McGrath v. Seagrave*, 2 Allen, 444.

Where, on appeal, the question of the interest of the judge arises, he is a competent witness on that issue. *Sigourney v. Sibley*, 21 Pick. 101, 32 Am. Dec. 248.

* See Note XLII.

¹³ *R. v. Gazard*, 1838, 8 C. & P. 595.

¹⁴ *Curry v. Walter*, 1796, 1 Esp. 456.

ARTICLE 112.

EVIDENCE AS TO AFFAIRS OF STATE.

No one can be compelled to give evidence relating to any affairs of State, or as to official communications between public officers upon public affairs, unless the officer at the head of the department concerned permits him to do so,¹⁵ or to give evidence of what took place in either House of Parliament, without the leave of the House, though he may state that a particular person acted as Speaker.¹⁶

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), secs. 250, 251; McKelvey on Evidence, p. 301.

MASSACHUSETTS.

Worthington v. Scribner, 109 Mass. 487, 488, 12 Am. Rep. 736.

ARTICLE 113.

INFORMATION AS TO COMMISSION OF OFFENCES.

In cases in which the government is immediately concerned no witness can be compelled to answer any question, the answer to which would tend to discover the names of persons by or to whom information was given as to the commission of offences.

¹⁵ *Beatson v. Skene*, 1860, 5 H. & N. 838.

¹⁶ *Chubb v. Salomons*, 1852, 3 Car. & Kir. 77; *Plunkett v. Cobbett*, 1804, 5 Esp. 136.

A criminal prosecution by the Director of Public Prosecutions is a public prosecution, and the Director of Public Prosecutions cannot be required to say from whom he acquired information or what it was.¹⁷

In ordinary criminal prosecutions it is for the judge to decide whether the permission of any such question would or would not, under the circumstances of the particular case, be injurious to the administration of justice.¹⁸

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), sec. 250; McKelvey on Evidence, p. 301.

MASSACHUSETTS.

Worthington v. Scribner, 109 Mass. 487, 488, 12 Am. Rep. 736.

ARTICLE 114.

COMPETENCY OF JURORS.

A petty juror may not¹⁹ and it is doubtful whether a grand juror may²⁰ give evidence as to what passed between the jurymen in the discharge of their duties. It is also doubtful whether a grand juror may give evidence as to what any witness said when examined before the grand jury.

¹⁷ *Marks v. Beyfus*, [1890], 25 Q. B. D. 494.

¹⁸ *R. v. Hardy*, 1794, 24 S. T. 811; *A. G. v. Bryant*, 1846, 15 M. & W. 169; *R. v. Richardson*, 1863, 3 F. & F. 693.

¹⁹ *Vaise v. Delaval*, 1785, 1 T. R. 11; *Burgess v. Langley*, 1843, 5 M. & G. 722.

²⁰ 1 Ph. Ev. 140; Taylor, s. 943.

AMERICAN NOTE.

GENERAL.

Authorities.—1 Wharton on Evidence, sec. 901 *et seq.*; 1 Greenleaf on Evidence (15th ed.), secs. 252, 252a.

Grand jurors.—Grand jurors may testify as to what particular witnesses said. *State v. Benner*, 64 Me. 267, 283.

In an action for malicious prosecution, one who was present may testify as to the evidence adduced before the grand jury. *Hunter v. Randall*, 69 Me. 183.

When an effort is made to impeach a witness by showing that he told a different story before the grand jury, the grand jurors are competent witnesses. *State v. Benner*, 64 Me. 267; *State v. Wood*, 53 N. H. 484.

It may be shown by the testimony of grand jurors that twelve did not concur in finding the indictment. *Low's Case*, 4 Me. 439, 444.

Petit jurors.—*Studley v. Hall*, 22 Me. 198, 201; *State v. Pike*, 65 Me. 111.

The testimony of jurors is not admissible to impeach their verdict as by showing their misconduct. *Shepherd v. Camden*, 82 Me. 535. But it is competent to prove the misconduct of parties with relation to themselves. *Heffron v. Gallupe*, 55 Me. 565.

CONNECTICUT.

The testimony of jurors is not admissible to impeach their verdict as by showing their misconduct. *Meade v. Smith*, 16 Conn. 346.

Grand jurors may testify as to what particular witnesses said. *State v. Coffee*, 56 Conn. 399.

It may not be shown by the testimony of grand jurors that twelve did not concur in finding the indictment. *State v. Fassett*, 16 Conn. 457, 466.

MASSACHUSETTS.

Grand jurors may testify as to whether or not one appeared before them as a witness. *Com. v. Hill*, 11 Cush. 137.

The testimony of jurors is not admissible to impeach their verdict, as by showing their misconduct. *Bridgewater v. Plymouth*, 97 Mass. 382. But it is competent to prove the misconduct of parties with reference to them. *Johnson v. Witt*, 138 Mass. 79.

Where an effort is made to impeach a witness by showing that he told a different story before the grand jury, the grand jurors are competent witnesses. *Com. v. Mead*, 12 Gray, 167.

Grand jurors.—As to grand jurors, see Pub. Stats., chap. 213, sec. 13.

Petit juror.—*Hannum v. Belchertown*, 19 Pick. 311, 313; *Com. v. White*, 147 Mass. 76; *Woodward v. Leavitt*, 107 Mass. 453; *Rowe v. Canney*, 139 Mass. 41.

ARTICLE 115.*

PROFESSIONAL COMMUNICATIONS.

No legal adviser is permitted, whether during or after the termination of his employment as such, unless with his client's express consent, to disclose any communication, oral or documentary, made to him as such legal adviser, by or on behalf of his client, during, in the course, and for the purpose of his employment, whether in reference to any matter as to which a dispute has arisen or otherwise, or to disclose any advice given by him to his client during, in the course, and for the purpose of such employment. It is immaterial whether the client is or is not a party to the action in which the question is put to the legal adviser.

This article does not extend to—

(1) Any such communication as aforesaid made in furtherance of any criminal purpose; whether such purpose was at the time of the communication known to the professional adviser or not;²¹

* See Note XLIII.

²¹ *R. v. Cox & Railton*, 1884, 14 Q. B. D. 153. The judgment in this case is that of ten judges in the Court for Crown Cases Reserved, and examines minutely all the cases on the subject. These cases put

(2) Any fact observed by any legal adviser, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether his attention was directed to such fact by or on behalf of his client or not;

(3) Any fact with which such legal adviser became acquainted otherwise than in his character as such.

The expression "legal adviser" includes barristers and solicitors,²² their clerks,²³ and interpreters between them and their clients. It does not include officers of a corporation through whom the corporation has elected to make statements.²⁴

Illustrations.

(a) A, being charged with embezzlement, retains B, a barrister, to defend him. In the course of the proceedings, B observes that an entry has been made in A's account book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of B's employment.

This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, is not protected from disclosure in a subsequent

the rule on the principle, that the furtherance of a criminal purpose can never be part of a legal adviser's business. As soon as a legal adviser knowingly takes part in preparing for a crime, he ceases to act as a lawyer and becomes a criminal — a conspirator or accessory as the case may be.

²² *Wilson v. Rastall*, 1792, 4 T. R. 753. As to interpreters, *Ib.* 756.

²³ *Taylor v. Foster*, 1825, 2 C. & P. 195; *Foot v. Hayne*, 1824, 1 C. & P. 545. *Quære*, whether licensed conveyancers are within the rule? Parke, B., in *Turquand v. Knight*, 1836, 2 M. & W. at p. 100, thought not. Special pleaders would seem to be on the same footing.

²⁴ *Mayor of Swansea v. Quirk*, 1879, 5 C. P. D. 106. Nor pursuivants of the Herald's College; *Slade v. Tucker*, 1880, 14 Ch. Div. 824.

action by A against the prosecutor in the original case for malicious prosecution.²⁵

(b) If a legal adviser witnesses a deed, he must give evidence as to what happened at the time of its execution.²⁶

(c) A retains B, an attorney, to prosecute C (whose property he had fraudulently acquired) for murder, and says, "It is not proper for me to appear in the prosecution for fear of its hurting me in the cause coming on between myself and him; but I do not care if I give £10,000 to get him hanged, for then I shall be easy in my title and estate." This communication is not privileged.²⁷

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), secs. 237–246, 261; 1 Wharton on Evidence, secs. 576–594; Weeks on Attorneys-at-Law (2d ed.), chap. 8; *McLellan v. Longfellow*, 32 Me. 494, 54 Am. Dec. 599; *Snow v. Gould*, 74 Me. 540, 43 Am. Rep. 604; *Thorne v. Kilborne*, 28 Vt. 750, 67 Am. Dec. 742; *Earle v. Grant*, 46 Vt. 113; *Wade v. Ridley*, 87 Me. 368.

A lawyer acting as a mere scrivener is not within the rule. *Childs v. Merrill*, 66 Vt. 302.

He must be acting as an attorney. *Coon v. Swan*, 30 Vt. 6.

Law students who are not clerks are not within the rule. *Holman v. Kimball*, 22 Vt. 555.

Statements made to an attorney, with a view to employing him, have been held within the rule, although he was never in fact employed. *Sargent v. Hampden*, 38 Me. 581.

Waiver.—The client may waive his right and allow the attorney to testify. *Sleeper v. Abbott*, 60 N. H. 162.

Learned from outside sources.—*State v. Fitzgerald*, 68 Vt. 125.

CONNECTICUT.

Brown v. Butler, 71 Conn. 583.

A bill of particulars prepared by a layman, by direction of the client, and handed by him to the attorney, who did not make use

²⁵ *Brown v. Foster*, 1857, 1 H. & N. 736.

²⁶ *Crawcour v. Salter*, 1881, 18 Ch. Div. pp. 35–6.

²⁷ *Annesley v. Anglesea*, 1743, 17 S. T. 1223–44.

of it, is not a privileged communication. *Pulford's Appeal*, 48 Conn. 249.

A mere conveyancer is not within the rule. *Todd v. Munson*, 53 Conn. 579.

One who overhears the conversation between attorney and client may testify. *Goddard v. Gardner*, 28 Conn. 172.

Where a client requests an attorney to obtain information as to facts, with reference to an estate in settlement, the communication is not privileged. *Turner's Appeal*, 72 Conn. 319.

An attorney may be required to testify by whom he is employed and in what capacity. *Turner's Appeal*, 72 Conn. 318.

A communication was made by a client to an attorney, in the office of the latter, which was in his dwelling-house, and in the presence of a son of the attorney, who lived in his family, but who had no connection with the professional business of his father. Held, that the communication was not, in relation to the son, a privileged one, and that it might be disclosed by his testimony. *Goddard v. Gardner*, 28 Conn. 175.

The rule which forbids an attorney from testifying in respect to matters communicated to him in professional confidence, tends to prevent a full disclosure of the truth in court, and should, therefore, be somewhat strictly construed. *Turner's Appeal*, 72 Conn. 306.

If this rule is invoked to exclude certain evidence, the burden is upon the objecting party to show that the communication objected to was in fact privileged. *Turner's Appeal*, 72 Conn. 306.

An attorney may be compelled to produce a client's paper, admitted by the pleadings to be in the client's hands. *Allen v. Hartford Life Ins. Co.*, 72 Conn. 696.

Criminal purpose.—Whether an attorney to whom a criminal project has been confided by his client may divulge it, *quære*. *State v. Barrows*, 52 Conn. 325.

MASSACHUSETTS.

Higbee v. Dresser, 103 Mass. 523; *Blount v. Kimpton*, 155 Mass. 378; *Anonymous*, 8 Mass. 370; *Foster v. Hall*, 12 Pick. 89; *Hatton v. Robinson*, 14 Pick. 416; *Barnes v. Harris*, 7 Cush. 576.

The fact that the client takes the stand does not constitute consent to the attorney to testify. *Montgomery v. Pickering*, 116 Mass. 227.

One who overhears the conversation between attorney and client may testify. *Hoy v. Morris*, 13 Gray, 519.

Law students who are not clerks are not within the rule. *Barnes v. Harris*, 7 Cush. 576. Nor those supposed to be lawyers, who in fact are not. *Barnes v. Harris*, 7 Cush. 576.

The rule does not apply to suits involving the construction of the client's will. *Doherty v. O'Callaghan*, 157 Mass. 90.

The rule does not exclude the testimony as to a public fact, although it would not have been learned but for the employment. *Com. v. Bacon*, 135 Mass. 521.

ARTICLE 116.

CONFIDENTIAL COMMUNICATIONS WITH LEGAL ADVISERS.

No one can be compelled to disclose to the Court any communication between himself and his legal adviser, which his legal adviser could not disclose without his permission, although it may have been made before any dispute arose as to the matter referred to;²⁸ but communications between a third party and a legal adviser are not protected unless the third party is acting as the agent of the person seeking advice, or the communications are made in contemplation of litigation, or for the purpose of giving advice or obtaining evidence with reference to it.²⁹

²⁸ *Minet v. Morgan*, 1873, 8 Ch. App. 361, reviewing all the cases, and adopting the explanation given in *Pearse v. Pearse*, 1846, 1 De G. & S. 18-31, of *Radcliffe v. Fursman*, 1730, 2 Br. P. C. 514. An illustration will be found in *Mayor of Bristol v. Cox*, 1884, 26 Ch. Div. 678.

²⁹ *Wheeler v. Le Marchant*, 1881, 17 Ch. D. 675. See, too, *Calcraft Guest*, [1898], 1 Q. B. 759.

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), secs. 240, 240a; Weeks on Attorneys-at-Law (2d ed.), sec. 162.

(First paragraph of text.) *Hemenway v. Smith*, 28 Vt. 701, 706.

MASSACHUSETTS.

If the party takes the stand he can be compelled to testify on cross-examination to communications with his counsel. *Inhabitants of Woburn v. Henshaw*, 101 Mass. 193, 200, 3 Am. Rep. 333.

ARTICLE 117.*

CLERGYMEN AND MEDICAL MEN.

Medical men³⁰ and [probably] clergymen may be compelled to disclose communications made to them in professional confidence.

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), secs. 247, 248; McKelvey on Evidence, p. 295.

MASSACHUSETTS.

Clergymen.—*Com. v. Drake*, 15 Mass. 161.

* See Note XLIV.

³⁰ *Duchess of Kingston's Case*, 1776, 20 S. T. 572-3. As to clergymen, see Note XLIV.

ARTICLE 118.

PRODUCTION OF TITLE-DEEDS OF WITNESS NOT A PARTY.

No witness who is not a party to a suit can be compelled to produce his title-deeds to any property,³¹ or any document the production of which might tend to criminate him, or expose him to any penalty or forfeiture;³² but a witness is not entitled to refuse to produce a document in his possession only because its production may expose him to a civil action,³³ or because he has lien upon it.³⁴

No bank is compellable to produce the books of such bank, except in the case provided for in Article 37.³⁵

AMERICAN NOTE.

GENERAL.

Authorities.—1 Wharton on Evidence, secs. 377, 537; 1 Greenleaf on Evidence (15th ed.), secs. 246, 451, 453.

³¹ *Pickering v. Noyes*, 1823, 1 B. & C. 263; *Adams v. Lloyd*, 1858, 3 H. & N. 351.

³² *Whitaker v. Izod*, 1809, 2 Tau. 115.

³³ *Doe v. Date*, 1842, 3 Q. B. 609, 618.

³⁴ *Hope v. Liddell*, 1855, 7 De G. M. & G. 331; *Hunter v. Leathley*, 1830, 10 B. & C. 858; *Brassington v. Brassington*, 1823, 1 Si. & Stu. 455. It has been doubted whether production may not be refused on the ground of a lien as against the party requiring the production. This is suggested in *Brassington v. Brassington*, and was acted upon by Lord Denman in *Kemp v. King*, 1842, 2 Mo. & Ro. 437; but it seems to be opposed to *Hunter v. Leathley*, 1830, 10 B. & C. 858, in which a broker who had a lien on a policy for premiums advanced was compelled to produce it in an action against the underwriter by the assured who had created the lien. See *Ley v. Barlow*, 1848 (per Parke, B.), 1 Ex. 801.

³⁵ 42 & 43 Vict. c. 11.

MASSACHUSETTS.

Affecting pecuniary interest.— *Bull v. Loveland*, 10 Pick. 9, 14; *Burnham v. Morissey*, 14 Gray, 226. See also *Adams v. Porter*, 1 Cush. 170.

ARTICLE 119.

PRODUCTION OF DOCUMENTS WHICH ANOTHER PERSON,
HAVING POSSESSION, COULD REFUSE TO PRODUCE.

No solicitor,³⁶ trustee, or mortgagee can be compelled to produce (except for the purpose of identification) documents in his possession as such, which his client, *cestui que trust*, or mortgagor would be entitled to refuse to produce if they were in his possession; nor can any one who is entitled to refuse to produce a document be compelled to give oral evidence of its contents.³⁷

AMERICAN NOTE.

GENERAL.

Authorities.— 1 Greenleaf on Evidence (15th ed.), secs. 241, 246; Weeks on Attorneys-at-Law (2d ed.), sec. 163.

He can be compelled to testify as to the existence of the paper. *Durkee v. Leland*, 4 Vt. 612.

CONNECTICUT.

See *Pulford's Appeal*, 48 Conn. 247.

³⁶ *Volant v. Soyer*, 1853, 13 C. B. 231; *Phelps v. Prew*, 1854, 3 E. & B. 431.

³⁷ *Davies v. Waters*, 1842, 9 M. & W. 608; *Few v. Guppy*, 1834, 13 Beav. 457.

ARTICLE 120.

WITNESS NOT TO BE COMPELLED TO CRIMINATE HIMSELF.

No one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the witness [or the wife or husband of the witness] to any criminal charge, or to any penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for;³⁸ but no one is excused from answering any question only because the answer may establish or tend to establish that he owes a debt, or is otherwise liable to any civil suit, either at the instance of the Crown or of any other person.³⁹

A person charged with an offence and being a witness in pursuance of the Criminal Evidence Act, 1898, may be

³⁸ *R. v. Boyes*, 1861, 1 B. & S. 330; followed and approved in *Ex parte Reynolds*, 1882, by the Court of Appeal; see 20 Ch. Div. 298. As to husbands and wives, see 1 Hale, P. C. 301; *R. v. Cliviger*, 1788, 2 T. R. 263; *Cartwright v. Green*, 1803, 8 Ve. 405; *R. v. Bathwick*, 1831, 2 B. & Ad. 639; *R. v. All Saints, Worcester*, 1817, 6 M. & S. 194. These cases show that even under the old law which made the parties and their husbands and wives incompetent witnesses, a wife was not incompetent to prove matter which might tend to incriminate her husband. *R. v. Cliviger* assumes that she was, and was to that extent overruled. As to the later law, see *R. v. Halliday*, 1860, Bell, 257. The cases, however, do not decide that if the wife claimed the privilege of not answering she would be compelled to do so, and to some extent they suggest that she would not.

³⁹ 46 Geo. III. c. 37. See *R. v. Scott*, 1856, 25 L. J. M. C. 128, and subsequent cases as to bankrupts, and *Ex parte Scholfield*, 1877, 6 Ch. Div. 230. *Quære*, Is he bound to produce a document incriminating himself? See *Webb v. East*, 1880, 5 Ex. D. 23 & 108.

asked any question in cross-examination, notwithstanding that it would tend to criminate him as to the offence charged.⁴⁰

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), secs. 451-453; Wharton on Evidence, secs. 533-541.

Exemption.—(First paragraph of text.) *Coburn v. Odell*, 30 N. H. 540; *Janvrin v. Scamaron*, 29 N. H. 280; *Chamberlain v. Wilson*, 12 Vt. 491.

The rule does not apply if the criminal prosecution is barred by lapse of time. *Childs v. Merrill*, 66 Vt. 302. Or statute granting an exemption to such witness. *State v. Nowell*, 58 N. H. 314.

By testifying as to part, the witness waives his protection and can be compelled to testify as to the whole. *Coburn v. Odell*, 30 N. H. 540; *State v. Witham*, 72 Me. 531.

Husband or wife.—*State v. Briggs*, 9 R. I. 361.

Waiver.—The privilege may be waived. *State v. Foster*, 23 N. H. 348.

CONNECTICUT.

The witness, by taking the stand, waives his protection. *State v. Griswold*, 67 Conn. 307.

A witness cannot be compelled to testify as to a conversation between himself and a juror, during the trial of a cause, in which his remarks were calculated to influence the juror in favor of one of the parties. *Grannis v. Branden*, 5 Day, 273.

Where a witness voluntarily testifies in chief on a particular subject, he may be cross-examined on the same subject, although his answers may criminate or disgrace him. *Norfolk v. Gaylord*, 28 Conn. 312.

If a question calls for that which would tend to blacken the witness's character, or prejudice the triers against him, he only, and not the counsel calling him, can object to it. *Kelsey v. Universal Life Ins. Co.*, 35 Conn. 235.

A witness cannot be compelled to give testimony which may expose him to a penalty. Nor, it seems, to give testimony which

may subject him to a debt, although called as a witness in a suit between third parties. *Benjamin v. Hathaway*, 3 Conn. 532.

A bondsman for the costs of prosecution cannot be compelled to testify as to facts coming to his knowledge after he gave bonds. *Simons v. Payne*, 2 Root, 407.

A witness cannot be compelled to disclose facts which would subject him to a criminal prosecution. *Grannis v. Branden*, 5 Day, 272; *Barnes v. State*, 19 Conn. 404.

On a prosecution for selling liquor to a common drunkard, the person claimed to be such was a witness for the State to prove the sale, and was asked, upon cross-examination, if he was a common drunkard. Held, that he was not bound to answer, as an answer might criminate him. *Barnes v. State*, 19 Conn. 404.

One who has committed a crime, a prosecution for which would be barred under the statute, unless he is within the proviso, cannot be permitted to decline to testify regarding the transaction, on the ground that he is within the proviso; but if compelled to testify, the court will not afterwards allow him to be prosecuted. *United States v. Smith*, 4 Day, 126.

MASSACHUSETTS.

Exemption.—(First paragraph of text.) *Emery's Case*, 107 Mass. 172; *Com. v. Trider*, 143 Mass. 180.

By testifying as to part the witness waives his protection and may be compelled to testify as to the whole. *Com. v. Pratt*, 126 Mass. 462; *Com. v. Nichols*, 114 Mass. 285; *Com. v. Smith*, 163 Mass. 431.

The court may, but need not, advise the witness of his right to refuse to answer. *Com. v. Howe*, 13 Gray, 26; *Com. v. Shaw*, 4 Cush. 594; *Mayo v. Mayo*, 119 Mass. 292.

Waiver.—The privilege given by the rule of this article may be waived. *Foster v. Pierce*, 11 Cush. 437, 59 Am. Dec. 152; *Com. v. Nichols*, 114 Mass. 285, 19 Am. Rep. 346; *Com. v. Morgan*, 107 Mass. 199.

Civil liability.—Sustaining text: *Bull v. Loveland*, 10 Pick. 9, 12.

ARTICLE 121.

CORROBORATION WHEN REQUIRED.*

No plaintiff in any action for breach of promise of marriage can recover a verdict, unless his or her testimony is corroborated by some other material evidence in support of such promise.⁴¹ The fact that the defendant did not answer letters affirming that he had promised to marry the plaintiff is not such corroboration.⁴²

No order against any person alleged to be the father of a bastard child can be made by any justices, or confirmed on appeal by any Court of Quarter Session, unless the evidence of the mother of the said bastard child is corroborated in some material particular to the satisfaction of the said justices or Court respectively.⁴³

No person can be convicted of an offence against sect. 4 of the Criminal Law Amendment Act, 1885, or an offence against the Prevention of Cruelty to Children Act, 1894, or an offence mentioned in the Schedule to that Act (as to which see p. 347, note 11, upon the unsworn evidence of a child of tender years, unless such unsworn evidence is corroborated by material evidence implicating the accused.⁴⁴

* See Article 122.

⁴¹ 32 & 33 Vict. c. 68, s. 2.

⁴² *Wiedemann v. Walpole*, [1891], 2 Q. B. 534.

⁴³ 8 & 9 Vict. c. 10, s. 6; 35 & 36 Vict. c. 6, s. 4.

⁴⁴ 48 & 49 Vict. c. 69, s. 4; 57 & 58 Vict. c. 41, s. 15. See Article 123A.

When the only proof against a person charged with a criminal offence is the evidence of an accomplice, uncorroborated in any material particular, it is the duty of the judge to warn the jury that it is unsafe to convict any person upon such evidence, though they have a legal right to do so.⁴⁵

AMERICAN NOTE.

GENERAL.

Authorities.—1 Wharton on Evidence, sec. 414; 1 Greenleaf on Evidence (15th ed.), secs. 379–382; 1 Am. & Eng. Encyclopædia of Law (2d ed.), p. 399.

The jury may convict on uncorroborated testimony. *State v. Potter*, 42 Vt. 495; *State v. Dana*, 59 Vt. 614; *State v. Litchfield*, 58 Me. 270; *State v. Cunningham*, 31 Me. 355; *State v. Kibling*, 63 Vt. 636.

In some States it is a practice to warn the jury. *State v. Kibling*, 63 Vt. 636.

It is not error to omit the caution. *State v. Potter*, 42 Vt. 495; *State v. Kibling*, 63 Vt. 636.

Detectives and others who act with the criminals, in order to bring them to justice, are not accomplices. *State v. Howsie*, 15 R. I. 1.

CONNECTICUT.

Accomplices.—The jury may convict without corroborative evidence. *State v. Maney*, 54 Conn. 178; *State v. Wolcott*, 21 Conn. 272; *State v. Stebbins*, 29 Conn. 463, 79 Am. Dec. 223; *State v. Williamson*, 42 Conn. 261.

The court should warn the jury, but if this is done they may convict although there is no corroboration. *State v. Williamson*, 42 Conn. 261; *State v. Maney*, 54 Conn. 178.

Any evidence is corroborative which tends to connect the defendant with the crime. *State v. Maney*, 54 Conn. 178.

One accomplice cannot corroborate another, unless, perhaps, they have had no opportunity to be together before the trial. *State v. Williamson*, 42 Conn. 265, 266.

⁴⁵ 1 Ph. Ev. 93–101; Taylor, ss. 967–971; 3 Russ. Cri. 642–653. See *In re Meunier*, [1894], 2 Q. B. 415.

The purchaser of liquor sold illegally is not an accomplice. *State v. Teahan*, 50 Conn. 101.

MASSACHUSETTS.

Accomplices.—The jury may convict without corroborative evidence. *Com. v. Bosworth*, 22 Pick. 397; *Com. v. Larrabee*, 99 Mass. 413; *Com. v. Scott*, 123 Mass. 237, 25 Am. Rep. 81; *Com. v. Holmes*, 127 Mass. 424, 34 Am. Rep. 391.

It is customary to advise the jury not to convict without corroboration. *Com. v. Price*, 10 Gray, 472, 71 Am. Dec. 668; *Com. v. Brooks*, 9 Gray, 299; *Com. v. Larrabee*, 99 Mass. 413.

It is not error, however, to refuse. *Com. v. Scott*, 123 Mass. 237, 25 Am. Rep. 81; *Com. v. Wilson*, 152 Mass. 12; *Com. v. Bishop*, 165 Mass. 148.

It is not error to omit the caution. *Com. v. Holmes*, 127 Mass. 424, 34 Am. Rep. 391.

Any evidence is corroborative which tends to connect the defendant with the crime. *Com. v. Holmes*, 127 Mass. 424.

Generally divorces will not be granted upon the testimony of parties alone. *Robbins v. Robbins*, 100 Mass. 150.

ARTICLE 121A.

CLAIM ON ESTATE OF DECEASED PERSON.

Claims upon the estates of deceased persons, whether founded upon an allegation of debt or of gift, ought not to be maintained upon the uncorroborated testimony of the claimant, unless circumstances appear or are proved which make the claim antecedently probable, or throw the burden of disproving it on the representatives of the deceased.

Illustrations.

(a) A, a widow, swore that her deceased husband gave her plate, &c., in his house, but no circumstances corroborated her allegation. Her claim was rejected.⁴⁶

⁴⁶ *Finch v. Finch*, 1883, 23 Ch. Div. 267.

(b) A, a widow, claimed the rectification of a settlement drawn by her husband the night before their marriage, and giving him advantages which, as she swore, she did not mean to give him, and were not explained to her by him. The settlement was not one which, in the absence of agreement between the parties, would have been sanctioned by the Court. Her claim was admitted though uncorroborated.⁴⁷

AMERICAN NOTE.

GENERAL.

See *Hatch v. Atkinson*, 56 Me. 324.

ARTICLE 122.

NUMBER OF WITNESSES.

In trials for high treason, or misprision of treason, no one can be indicted, tried, or attainted (unless he pleads guilty) except upon the oath of two lawful witnesses, either both of them to the same overt act, or one of them to one and another of them to another overt act of the same treason. If two or more distinct treasons of divers heads or kinds are alleged in one indictment, one witness produced to prove one of the said treasons and another witness produced to prove another of the said treasons are not to be deemed to be two witnesses to the same treason within the meaning of this article.⁴⁸

This provision does not apply to cases of high treason in

⁴⁷ *Livesey v. Smith*, 1880, 15 Ch. Div. 655. In *re Garnett, Gandy v. Macaulay*, 1885, 31 Ch. Div. 1, is a similar case. In *re Hodgson, Beckett v. Ramsdale*, 1885, 31 Ch. Div. p. 183, the language of Hannen, J., in words somewhat relaxes the rule, but not, I think, in substance.

⁴⁸ 7 & 8 Will. III. c. 3, ss. 2, 4.

compassing or imagining the Queen's death, in which the overt act or overt acts of such treason alleged in the indictment are assassination or killing of the Queen, or any direct attempt against her life, or any direct attempt against her person, whereby her life may be endangered or her person suffer bodily harm,⁴⁹ or to misprision of such treason.

If upon a trial for perjury the only evidence against the defendant is the oath of one witness contradicting the oath on which perjury is assigned, and if no circumstances are proved which corroborate such witness, the defendant is entitled to be acquitted.⁵⁰

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), secs. 255-259; 1 Wharton on Evidence, sec. 414.

Treason against the United States. Art. 3, sec. 3, of the U. S. Constitution.

CONNECTICUT.

Treason.—Conn. Constitution, art. 9, sec. 4.

MASSACHUSETTS.

In treason two witnesses are required. Pub. Stats., chap. 201, sec. 4.

Perjury.—*Com. v. Parker*, 2 Cush. 212.

In perjury, one witness, with corroborating circumstances, is sufficient. *Com. v. Parker*, 2 Cush. 212; *Com. v. Butland*, 119 Mass. 317, 324; *Com. v. Pollard*, 12 Metc. 225.

⁴⁹ 39 & 40 Geo. III. c. 93.

⁵⁰ 1 Russ. on Crimes, 368.

CHAPTER XVI.

*OF TAKING ORAL EVIDENCE, AND OF THE EXAMINATION
OF WITNESSES.*

ARTICLE 123.

EVIDENCE TO BE UPON OATH, EXCEPT IN CERTAIN CASES.

ALL oral evidence given in any proceeding must be given upon oath, except as is stated in this and the following article.

Every person objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, may make his solemn affirmation, which is of the same force and effect as if he had taken the oath, and if, having made such affirmation, he wilfully and corruptly gives false evidence, he is liable to be punished as for perjury.

Such affirmation must be as follows:—

“I, A. B., do solemnly, sincerely, and truly declare and affirm,”

and then proceed with the words of the oath prescribed by law, omitting any words of imprecation or calling to witness.¹

¹ 51 & 52 Vict. c. 46, the Oaths Act, 1888, which repeals the previous enactments on the subject.

Where an oath has been duly administered and taken, the fact that the person to whom the same was administered had, at the time of taking such oath, no religious belief, does not for any purpose affect the validity of such oath.²

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), sec. 371.

CONNECTICUT.

Affirmation is allowed by Gen. Stats., sec. 3262.

An Atheist may testify but the fact may be shown. Gen. Stats., sec. 1098. See also article 107 of this book.

ARTICLE 123A.

UNSWORN EVIDENCE OF YOUNG CHILD.

Where upon the hearing of a charge under sect. 4 of the Criminal Law Amendment Act, 1885, a child of tender years who is tendered as a witness does not, in the opinion of the Court, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the Court, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth;³

Provided that no person can be convicted in such a case unless such unsworn evidence is corroborated by other material evidence implicating the accused.³

² 51 & 52 Vict. c. 46, s. 3.

³ 48 & 49 Vict. c. 69, s. 4. The offences under this section are, unlawfully and carnally knowing, and attempting unlawfully and carnally to know any girl under thirteen.

Any witness whose evidence, not upon oath, has been admitted as mentioned in this article is liable to indictment and punishment for perjury in all respects as if he or she had been sworn.³

If evidence not upon oath is given under the provisions stated in this article, and the charge is one of felony, the prisoner may be convicted under sect. 9 of the Criminal Law Amendment Act, 1885, of an offence⁴ in respect of which such unsworn evidence might not have been given.⁵ If the charge is one of misdemeanour, the prisoner cannot be convicted of another misdemeanour, in respect of which such unsworn evidence might not have been given, if such other misdemeanour was charged in another count of the indictment.⁶

Where, in any proceeding against any person for an offence under the Prevention of Cruelty to Children Act, 1894, or for any of the offences mentioned in the Schedule to that Act,⁷ the child in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not, in the opinion of the Court, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the Court, such child

³ 48 & 49 Vict. c. 69, s. 4. The offences under this section are, unlawfully and carnally knowing, and attempting unlawfully and carnally to know any girl under thirteen.

⁴ These offences are, any offence under ss. 3, 4, 5 of the Criminal Law Amendment Act, 1885, and indecent assault.

⁵ *R. Wealand*, 1888, 20 Q. B. D. 827. See Note XLIVA.

⁶ *R. v. Paul*, [1890], 25 Q. B. D. 202. See note XLIVA.

⁷ See p. 347, note 11.

is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

And the evidence of such child, though not given on oath, but otherwise taken and reduced into writing, in accordance with the provisions of sect. 17 of the Indictable Offences Act, 1848,⁸ or sect. 13 of the Prevention of Cruelty to Children Act, 1894,⁹ shall be deemed to be a deposition within the meaning of those sections respectively.

Provided that—

(a) a person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused; and

(b) any child whose evidence is received as aforesaid and who shall wilfully give false evidence shall be liable to be indicted and tried for such offence, and on conviction thereof may be adjudged such punishment as is provided for by section 11 of the Summary Jurisdiction Act, 1879, in the case of juvenile offenders.¹⁰

ARTICLE 123B.

UNSWORN EVIDENCE OF A BARRISTER.

A barrister giving evidence in Court, in proceedings where evidence is usually given by affidavit, as to his action

⁸ See Article 140.

⁹ See Article 141B.

¹⁰ 57 & 58 Vict. c. 41, s. 15.

in his professional capacity in previous proceedings makes a statement from his seat in Court without an oath having been administered to him.¹¹

ARTICLE 124.

FORM OF OATHS; BY WHOM THEY MAY BE ADMINISTERED.

Oaths are binding which are administered in such form and with such ceremonies as the person sworn declares to be binding.¹²

Any person to whom an oath is administered, who so desires, may be sworn with uplifted hand in the form and manner usual in Scotland.¹³

Every person now or hereafter having power by law or by consent of parties to hear, receive, and examine evidence, is empowered to administer an oath to all such witnesses as are lawfully called before him.¹⁴

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), sec. 371; 1 Wharton on Evidence, sec. 387.

¹¹ *Hickman v. Berens*, [1895], 2 Ch. p. 638, following the previous unreported case of *Kempshall v. Holland* (but see 98 L. T. p. 489, Leading Article), decided in the Court of Appeal. In the former case the original proceedings took place before an official referee; in both the barrister's statement was in substitution for an affidavit. See Article 111, and Note XLII.

¹² 1 & 2 Vict. c. 105. For the old law, see *Omichund v. Barber*, 1745, 1 S. L. C., 7th Ed., 445.

¹³ 51 & 52 Vict. c. 46, s. 5.

¹⁴ 14 & 15 Vict. c. 99, s. 16.

Making provisions similar to those of the text. Maine Rev. Stats., chap. 82, sec. 103.

MASSACHUSETTS.

Making provision similar to that of last paragraph of text. Pub. Stats., chap. 169, secs. 7, 12, 13.

ARTICLE 125.

HOW ORAL EVIDENCE MAY BE TAKEN.

Oral evidence may be taken¹⁵ (according to the law relating to civil and criminal procedure)—

In open court upon a final or preliminary hearing;

Or out of court for future use in court—

(a) upon affidavit,

(b) under a commission,¹⁶

(c) before any officer of the Court or any other person or persons appointed for that purpose by the Court or a judge under the Judicature Act, 1875, Order XXXVII., Rule 5.

¹⁵ As to civil procedure, see Order XXXVII. to Judicature Act of 1875. As to criminal procedure, see 11 & 12 Vict. c. 42, for preliminary procedure, and the rest of this chapter for final hearings.

¹⁶ The law as to commissions to take evidence is as follows: The root of it is 13 Geo. III. c. 53. Sect. 40 of this Act provides for the issue of a commission to the Supreme Court of Calcutta (which was first established by that Act) and the corresponding authorities at Madras and Bombay to take evidence in cases of charges of misdemeanour brought against Governors, &c., in India in the Court of Queen's Bench. Sect. 42 applies to parliamentary proceedings, and s. 44 to civil cases in India. These provisions have been extended to all the colonies by 1 Will. IV. c. 22, and so far they relate to civil proceedings to the world at large. 3 & 4 Vict. c. 105, gives a similar power to the Courts at Dublin. See as to cases in which commissions

Oral evidence taken upon a preliminary hearing may, in the cases specified in Articles 140-142, be recorded in the form of a deposition, which deposition may be used as a documentary evidence of the matter stated therein in the cases and on the conditions specified in Chapter XVII.

Oral evidence taken in open court must be taken according to the rules contained in this chapter relating to the examination of witnesses.

¹⁷ Oral evidence taken under a commission must be taken in the manner prescribed by the terms of the commission.

¹⁸ Oral evidence taken under a commission must be taken in the same manner as if it were taken in open court; but the examiner has no right to decide on the validity of objections taken to particular questions, but must record the questions, the fact that they were objected to, and the answers given.

¹⁹ If secondary evidence of the contents of any document is not objected to on the taking of a commission it cannot be objected to afterwards.

²⁰ Oral evidence given on affidavit must be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief and the grounds thereof may be ad-

will not be granted, *In re Boyce, Crofton v. Crofton*, 1882, 20 Ch. Div. 760; and *Berdan v. Greenwood*, 1880, *ibid.*, in note, 764; also *Langen v. Tate*, 1883, 24 Ch. Div. 322; *Lawson v. Vacuum Brake Co.*, 1884; 27 Ch. Div. 137.

¹⁷ Taylor, s. 513.

¹⁸ *Id.* s. 512.

¹⁹ *Robinson v. Davies*, 1879, 5 Q. B. D. 26.

²⁰ R. S. C., Order XXXVIII., 3.

mitted. The costs of every affidavit unnecessarily setting forth matters of hearsay or argumentative matter, or copies of or extracts from documents, must be paid by the party filing them.

²¹ When a deposition, or the return to a commission, or an affidavit, or evidence taken before an examiner, is used in any court as evidence of the matter stated therein, the party against whom it is read may object to the reading of anything therein contained on any ground on which he might have objected to its being stated by a witness examined in open court, provided that no one is entitled to object to the reading of any answer to any question asked by his own representative on the execution of a commission to take evidence.

ARTICLE 126.*

EXAMINATION IN CHIEF, CROSS-EXAMINATION, AND RE-EXAMINATION.

Witnesses examined in open court must be first examined in chief, then cross-examined, and then re-examined.

Whenever any witness has been examined in chief, or has been ²² intentionally sworn, or has made a promise and declaration as hereinbefore mentioned for the purpose of giving evidence, the opposite party has a right to cross-examine him; but the opposite party is not entitled to

* See Note XLV.

²¹ Taylor, s. 548. *Hutchinson v. Bernard*, 1836, 2 Moo. & Rob. 1.

²² See Cases in Taylor, s. 1429.

cross-examine merely because a witness has been called to produce a document on a *subpœna duces tecum*, or in order to be identified. After the cross-examination is concluded, the party who called the witness has a right to re-examine him.

The Court may in all cases permit a witness to be recalled either for further examination in chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and further re-examination respectively.

If a witness dies, or becomes incapable of being further examined at any stage of his examination, the evidence given before he became incapable is good.²³

If in the course of a trial a witness who was supposed to be competent appears to be incompetent, his evidence may be withdrawn from the jury, and the case may be left to their decision independently of it.²⁴

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), sec. 431 *et seq.*; 8 Encyclopædia of Pleading and Practice, p. 70 *et seq.*

MASSACHUSETTS.

Witness to produce document.—*Stiles v. Allen*, 5 Allen, 320.

²³ *R. v. Doolin*, 1832, 1 Jebb, C. C. 123. The judges compared the case to that of a dying declaration, which is admitted though there can be no cross-examination.

²⁴ *R. v. Whitehead*, 1866, 1 C. C. R. 33.

ARTICLE 127.

TO WHAT MATTERS CROSS-EXAMINATION AND RE-EXAMINATION MUST BE DIRECTED.

The examination and cross-examination must relate to facts in issue or relevant or deemed to be relevant thereto, but the cross-examination need not be confined to the facts to which the witness testified on his examination in chief.

The re-examination must be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

AMERICAN NOTE.

GENERAL.

Authorities.—1 Wharton on Evidence, sec. 529; 1 Greenleaf on Evidence (15th ed.), secs. 445-447, 467.

Re-examination.—*Oakland Ice Co. v. Marcy*, 74 Me. 294, 301.

CONNECTICUT.

The cross-examination must be limited to the matters covered by the direct examination. *State v. Smith*, 49 Conn. 376; *Chapman v. Loomis*, 36 Conn. 460; *Burns v. Fredericks*, 37 Conn. 91; *Ashborn v. Waterbury*, 69 Conn. 217; *State v. Green*, 35 Conn. 208.

The court has a discretionary power as to how far to permit cross-examination to extend to matters not strictly germane to the direct examination, and no error can be predicated upon the exercise of such discretion. *Steene v. Aylesworth*, 18 Conn. 254; *Chapman v. Loomis*, 36 Conn. 466; *State v. Bradley*, 48 Conn. 535; *Tompkins v. West*, 56 Conn. 484; *Dale's Appeal*, 57 Conn. 142; *State v. Duffy*, 57 Conn. 528, 529; *Tyler v. Waddingham*, 58 Conn. 396, 397; *Osborne v. Troup*, 60 Conn. 498; *State v. McGowan*, 66 Conn. 392; *Spiro v. Nitkin*, 72 Conn. 202.

MASSACHUSETTS.

Scope of cross-examination.—*Blackington v. Johnson*, 126 Mass. 21; *Beal v. Nichols*, 2 Gray, 262; *Moody v. Rowell*, 17 Pick. 490, 498; *Merrill v. Berkshire*, 11 Pick. 269; *Webster v. Lee*, 5 Mass. 334; *Gerrish v. Cummings*, 4 Cush. 391; *Stiles v. Allen*, 5 Allen, 320.

Re-examination.—*Farrell v. Boston*, 161 Mass. 106; *Dole v. Wooldredge*, 142 Mass. 161.

ARTICLE 128.

LEADING QUESTIONS.

Questions suggesting the answer which the person putting the question wishes or expects to receive, or suggesting disputed facts as to which the witness is to testify, must not, if objected to by the adverse party, be asked in examination in chief, or in re-examination, except with the permission of the Court, but such questions may be asked in cross-examination.

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), secs. 434, 435, 445; 1 Wharton on Evidence, secs. 499–504.

Numerous items.—Where the examination relates to items too numerous to be thought of by the witness, leading questions may be employed. *Huckins v. People's Ins. Co.*, 31 N. H. 238.

Hostile witness.—The court may allow leading questions on the direct if the witness is hostile. *State v. Benner*, 64 Me. 267; *Whitman v. Morey*, 63 N. H. 448.

CONNECTICUT.

A leading question may be replaced by a proper one. *Allen v. Hartford Life Ins. Co.*, 72 Conn. 697.

Hostile witness.—In case of a hostile witness, the court may allow leading questions on the direct examination. *Stratford v. Sanford*, 9 Conn. 284; *State v. Stevens*, 65 Conn. 93.

Cross-examination.—*Stratford v. Sanford*, 9 Conn. 284.

MASSACHUSETTS.

Leading questions.—*Moody v. Rowell*, 17 Pick. 498, 28 Am. Dec. 317.

It is discretionary with the court in both civil and criminal cases to allow leading questions on the direct examination. *Green v. Gould*, 3 Allen, 465; *Com. v. Thrasher*, 11 Gray, 57; *Moody v. Rowell*, 17 Pick. 490, 498.

The judge may himself ask leading questions of a witness. *Com. v. Galavan*, 9 Allen, 271.

ARTICLE 129.*

QUESTIONS LAWFUL IN CROSS-EXAMINATION.

When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—

- (1) To test his accuracy, veracity, or credibility; or
- (2) To shake his credit, by injuring his character,

Provided that a person charged with a criminal offence and being a witness under the Criminal Evidence Act, 1898, may be cross-examined to the effect, and under the circumstances, described in Article 56.

Witnesses have been compelled to answer such questions, though the matter suggested was irrelevant to the matter in issue, and though the answer was disgraceful to the witness; but it is submitted that the Court has the right to exercise a discretion in such cases, and to refuse to compel

* See Note XLVI.

such questions to be answered when the truth of the matter suggested would not in the opinion of the Court affect the credibility of the witness as to the matter to which he is required to testify.

In the case provided for in Article 120, a witness cannot be compelled to answer such a question.

Illustration.

(a) The question was whether A committed perjury in swearing that he was R. T. B deposed that he made tattoo marks on the arm of R. T., which at the time of the trial were not and never had been on the arm of A. B was asked and was compelled to answer the question whether, many years after the alleged tattooing, and many years before the occasion on which he was examined, he committed adultery with the wife of one of his friends.²⁵

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), secs. 445, 446, 451–460; 1 Wharton on Evidence, secs. 527–548.

A witness may be compelled to answer questions tending to disgrace him. The extent to which they may be asked is discretionary with the court. *Gutterson v. Morse*, 58 N. H. 165.

CONNECTICUT.

To test accuracy, etc.—*State v. Duffy*, 57 Conn. 525.

The witness may be asked if he has had a lawsuit with one of the parties. *Spiro v. Nitkin*, 72 Conn. 205.

Questions may be asked on cross-examination to show the interest of the witness in the result of the suit. *Dore v. Babcock*, 72 Conn. 409.

One accused of crime, who chooses to testify in his own behalf, subjects himself to the same rules and tests as are applied to other witnesses; and the extent to which he may be cross-examined,

²⁵ *R. v. Orton*, 1874. See summing-up of Cockburn, C.J., vol. ii. p. 719, &c.

where such inquiry tends to show that he has been guilty of willful falsehood in his direct examination, is largely within the discretion of the trial court. *State v. Griswold*, 67 Conn. 290.

A witness was asked whether he did not live with a woman who kept a house of ill-fame. The court, against objection, admitted the question, informing the witness that he could answer it or not, as he chose. Held, to be no error. *State v. Ward*, 49 Conn. 442 (433).

In reply to questions on cross-examination, the witness stated that so far as she knew, her husband was sober on the day of the shooting, and had not been drinking. She was then asked whether he was not an habitual drinker, and if she had not so testified on the preliminary hearing. These questions were objected to by the State and excluded by the court. The witness had not been inquired of in her direct examination as to her husband's habits regarding drink, nor in regard to his mental or physical condition at the time of the shooting. Held, that the questions were not properly cross-examination, and that it was within the discretion of the trial court to require the defendant to present these matters, if material, in his defense. If the questions were asked solely for the purpose of testing the credibility of the witness, their allowance or disallowance was within the discretion of the court. *State v. McGowan*, 66 Conn. 392.

In a suit by a physician to recover for services rendered by a substitute, the substitute having testified that the charges are reasonable, may be asked on cross-examination what his own fees would have been. *Sayles v. Fitz Gerald*, 72 Conn. 395.

A question intimating that another witness has testified differently from the one under examination is not proper on cross-examination. *Turner's Appeal*, 72 Conn. 314.

The weight of evidence depends much upon the means of information of the witness. An inquiry, therefore, how long and in what capacity the prisoner had been an inmate in the witness's family, when the witness testified as to the character of the accused, should have been allowed. *State v. Jerome*, 33 Conn. 269.

MASSACHUSETTS.

Questions to test the moral sense of the witness are not allowable. *Com. v. Shaw*, 4 Cush. 593.

A witness may be asked if he has been in prison. *Com. v. Bonner*, 97 Mass. 587.

Purely collateral matters to affect credibility are not admissible. This is largely a question of discretion. *Com v. Schaffner*, 146 Mass. 512; *Sullivan v. O'Leary*, 146 Mass. 322.

Bias, etc.—Questions to show bias, etc., are allowed. *Wallace v. Taunton St. R. R. Co.*, 119 Mass. 91.

ARTICLE 129A.

JUDGE'S DISCRETION AS TO CROSS-EXAMINATION TO CREDIT.

The judge may in all cases disallow any questions put in cross-examination of any party or other witness which may appear to him [*i.e.* the judge] to be vexatious and not relevant to any matter proper to be inquired into in the cause or matter.²⁶

AMERICAN NOTE.

See note under Article 129.

ARTICLE 130.

EXCLUSION OF EVIDENCE TO CONTRADICT ANSWERS TO QUESTIONS TESTING VERACITY.

When a witness under cross-examination has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence can be given to contradict him except in the following cases:—²⁷

²⁶ R. S. C., Order XXXVI., rule 38. I leave Article 129 as it originally stood; because this Order is after all only an exception to the rule. "Him" must refer to the judge, as it would otherwise refer to the "party or other witness," which would be absurd.

²⁷ *A. G. v. Hitchcock*, 1847, 1 Ex. 91, 99–105. See, too, *Palmer v. Trower*, 1852, 8 Ex. 247.

(1) If a witness is asked whether he has been previously convicted of any felony or misdemeanour, and denies or does not admit it, or refuses to answer, evidence may be given of his previous conviction thereof.²⁸

(2) If a witness is asked any question tending to show that he is not impartial, and answers it by denying the facts suggested, he may be contradicted.²⁹

AMERICAN NOTE.

GENERAL.

Authorities.—1 Wharton on Evidence, sec. 559; 1 Greenleaf on Evidence (15th ed.), sec. 449.

(First paragraph of text.) *Coombs v. Winchester*, 39 N. H. 13, 75 Am. Dec. 203; *Davis v. Roby*, 64 Me. 427.

The witness cannot be contradicted as to collateral matters. *State v. Benner*, 64 Me. 267.

Interest.—*Folsom v. Brown*, 25 N. H. 114.

Conviction.—Conviction of crime may be shown. New Hampshire Pub. Stats., chap. 224, sec. 26.

The conviction may be proved by the record or by the answers of the witness on cross-examination. *State v. Elwood*, 17 R. I. 763; *State v. McGuire*, 15 R. I. 23.

CONNECTICUT.

A witness cannot be cross-examined as to irrelevant matters for the mere purpose of contradicting him. *Tyler v. Todd*, 36 Conn. 224.

A party who puts an irrelevant question, on cross-examination, cannot afterwards offer evidence to contradict the answer given. *Winton v. Meeker*, 25 Conn. 464.

A witness may always be asked any question relative to the issue, for the purpose of contradicting him, if his answer be one way, by other witnesses, in order to discredit his whole testimony; but he

²⁸ 28 & 29 Vict. c. 18, s. 6; re-enacting 17 & 18 Vict. c. 125, s. 25, now repealed.

²⁹ *A. G. v. Hitchcock*, 1847, 1 Ex. 91, pp. 100, 105.

may not be interrogated as to any collateral independent fact. *Atwood v. Welton*, 7 Conn. 70.

In a *qui tam* action for taking usury, the party who had paid it, having testified to that effect, was asked on cross-examination, whether he had not had a controversy with the defendant, and threatened to be revenged on him for collecting the note alleged to be usurious. Held, that the questions were admissible, and that his answers in the negative might be contradicted by other testimony. *Atwood v. Welton*, 7 Conn. 70.

Interest.—Sustaining text: *Beardsley v. Wildman*, 41 Conn. 515.

MASSACHUSETTS.

The witness cannot be contradicted as to collateral matters. *Alexander v. Kaiser*, 149 Mass. 321; *McGuire v. McDonald*, 99 Mass. 49; *Com. v. Lyden*, 113 Mass. 452.

Conviction.—Pub. Stats., chap. 169, sec. 19; *Com. v. Bonner*, 97 Mass. 587; *Com. v. Gorham*, 99 Mass. 420.

ARTICLE 131.*

STATEMENTS INCONSISTENT WITH PRESENT TESTIMONY MAY BE PROVED.

Every witness under cross-examination in any proceeding, civil or criminal, may be asked whether he has made any former statement relative to the subject-matter of the proceeding and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and if he does not distinctly admit that he has made such a statement, proof may be given that he did in fact make it.

The same course may be taken with a witness upon his examination in chief, if the judge is of opinion that he

* See Note XLVII.

is "adverse" [*i.e.* hostile] to the party by whom he was called and permits the question.

It seems that the discretion of the judge cannot be reviewed afterwards.³⁰

AMERICAN NOTE.

GENERAL.

Authorities.—10 Encyclopædia of Pleading and Practice, p. 279 *et seq.*; 1 Greenleaf on Evidence (15th ed.), sec. 462; *Sanderson v. Nashua*, 44 N. H. 492; *Martin v. Towle*, 59 N. H. 31.

The contradictory statements may be proved independently, without first asking the witness if he made them. *Ware v. Ware*, 8 Greenl. (Me.) 42, 53; *Wilkins v. Bobbershall*, 32 Me. 184; *Cook v. Brown*, 34 N. H. 460; *Robinson v. Hutchinson*, 31 Vt. 443, 449; *Holbrook v. Holbrook*, 30 Vt. 433.

One cannot thus impeach his own witness. *Cox v. Eayres*, 55 Vt. 24, 45 Am. Rep. 583.

Where one calls the adverse party, he may impeach him under the New Hampshire statute. Pub. Stats., chap. 224, sec. 15.

Some courts hold that a party cannot impeach his own witness, by proving inconsistent statements. *Cox v. Eayres*, 55 Vt. 24. But see Stats. of Vermont, sec. 1247; *Hildreth v. Aldrich*, 15 R. I. 163. This does not apply to a witness whom one is obliged to call (*e. g.*, attesting witnesses). *Thornton v. Thornton*, 39 Vt. 122; *Shorey v. Hussey*, 32 Me. 579; *Whitman v. Morey*, 63 N. H. 448; *State v. Slack*, 69 Vt. 486; *Hildreth v. Aldrich*, 15 R. I. 163. Nor to an adverse witness. *Hurlburt v. Bellows*, 50 N. H. 102.

CONNECTICUT.

(First paragraph of text.) *Stratford v. Fairfield*, 3 Conn. 591; *Burns v. Fredericks*, 37 Conn. 92; *Beardsley v. Wildman*, 41 Conn. 516; *Harrison's Appeal*, 48 Conn. 206.

The contradictory statements may be proved independently, without first asking the witness if he made them. *Hedge v. Clapp*, 22 Conn. 262, 265, 9 Am. Dec. 137; *Tomlinson v. Derby*, 43 Conn. 562; *Butler v. Cornwall Iron Co.*, 22 Conn. 357.

³⁰ *Rice v. Howard*, 1886, 16 Q. B. D. 681.

Some courts hold that a party cannot impeach his own witness by proving inconsistent statements. *Wheeler v. Thomas*, 67 Conn. 577.

Where a party has offered an account-book in evidence, evidence that upon the trial of another case he had testified that he had no such book, is admissible. *Sayles v. Fitz Gerald*, 72 Conn. 391.

MASSACHUSETTS.

If the statement is of some irrelevant matter, the answer of the witness is binding. *Com. v. Mooney*, 110 Mass. 99, 101.

Some courts hold that a party cannot impeach his own witness, by proving inconsistent statements. *Adams v. Wheeler*, 97 Mass. 67. But see Pub. Stats., chap. 169, sec. 22.

The contradictory statements may be proved independently, without first asking the witness if he made them. *Tucker v. Welsh*, 17 Mass. 160, 166, 9 Am. Dec. 137; *Day v. Stickney*, 14 Allen, 255, 260; *Gould v. Norfolk Lead Co.*, 9 Cush. 338. Compare *Cogswell v. Newburyport Sav. Inst.*, 165 Mass. 524; *Com. v. Smith*, 163 Mass. 411.

ARTICLE 132.

CROSS-EXAMINATION AS TO PREVIOUS STATEMENTS IN WRITING.

A witness under cross-examination [or a witness whom the judge under the provisions of Article 131 has permitted to be examined by the party who called him as to previous statements inconsistent with his present testimony] may be questioned as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the indictment or proceeding, without such writing being shown to him [or being proved in the first instance]; but if it is intended to contradict him by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of contradicting him. The

judge may, at any time during the trial, require the document to be produced for his inspection, and may thereupon make such use of it for the purposes of the trial as he thinks fit.³¹

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), secs. 463–465; 1 Wharton on Evidence, sec. 68; 10 Encyclopædia of Pleading and Practice, p. 291 *et seq.* See *Whitman v. Morey*, 63 N. H. 448.

CONNECTICUT.

Modifying rule of the text: *Morford v. Peck*, 46 Conn. 380.

MASSACHUSETTS.

Modifying rule of the text: *Hosmer v. Groat*, 143 Mass. 16.

ARTICLE 133.

IMPEACHING CREDIT OF WITNESS.

The credit of any witness may be impeached by the adverse party, by the evidence of persons who swear that they, from their knowledge of the witness, believe him to be unworthy of credit upon his oath. Such persons may not upon their examination in chief, give reasons for their belief, but they may be asked their reasons in cross-examination, and their answers cannot be contradicted.³²

³¹ 28 Vict. c. 18, s. 5, re-enacting 17 & 18 Vict. c. 125, s. 24, now repealed. I think the words between brackets represent the meaning of the sections, but in terms they apply only to witnesses under cross-examination—"Witness may be cross-examined," &c.

³² 2 Ph. Ev. 503–4; Taylor, 1470, 1470A. See *R. v. Brown*, 1867, 1 C. C. R. 70.

No such evidence may be given by the party by whom any witness is called,³³ but, when such evidence is given by the adverse party, the party who called the witness may give evidence in reply to show that the witness is worthy of credit.³⁴

AMERICAN NOTE.

GENERAL.

Authorities.—10 Encyclopædia of Pleading and Practice, p. 299 *et seq.*; 1 Wharton on Evidence, secs. 397, 567, 568; 1 Greenleaf on Evidence (15th ed.), sec. 461.

An impeaching witness may be cross-examined as to the source of his information. *State v. Howard*, 9 N. H. 485.

One may contradict his own witness. *Seavy v. Dearborn*, 19 N. H. 351; *Swamscot Mach. Co. v. Walker*, 22 N. H. 457.

General reputation as to truthfulness may be shown. *State v. Howard*, 9 N. H. 485; *Titus v. Ash*, 24 N. H. 319.

CONNECTICUT.

Impeaching witness may not be asked reasons on the direct, but may on the cross-examination. *Weeks v. Hull*, 19 Conn. 376, 379, 50 Am. Dec. 249.

One cannot impeach his own witness under the rule of the text. *Wheeler v. Thomas*, 67 Conn. 577. He may contradict him, however. *Wheeler v. Thomas*, 67 Conn. 577; *Olmstead v. Winsted Bank*, 32 Conn. 278, 85 Am. Dec. 260.

As a general rule, a witness cannot be supported by evidence of his general character for truth, excepting after a general impeachment of it. *Merriam v. H. & N. H. R. R. Co.*, 20 Conn. 364.

The character of a witness introduced by one party, but improved only by the other, may be impeached by the former. *Bebee v. Tinker*, 2 Root, 160.

It is well settled that a new trial should not be granted for newly-discovered evidence that would impeach the general reputation of a witness for truth and veracity. Evidence that a witness since the trial had told a different story from that which was told in court,

is essentially of an impeaching character. *Husted v. Mead*, 58 Conn. 61, 62.

Except in prosecutions for rape or attempted rape, evidence is not admissible in support of the general character of a witness for truth, unless a direct attempt has been made to impeach it, or he is a stranger. *Rogers v. Moore*, 10 Conn. 16, 17.

The character of a witness for truth is the only thing that can be attacked, in an attempt to impeach him. *State v. Randolph*, 24 Conn. 366.

The proper inquiries, under our practice, to put to an impeaching witness, are, "Are you acquainted with the character of the witness?" and, if an affirmative answer is given, "Is his character for truth on a par with that of mankind in general?" *State v. Randolph*, 24 Conn. 367, 368.

A single witness was introduced to impeach another witness; and the court charged the jury that, while it was usual to introduce more than one witness for such a purpose, yet if the impeaching witness had the means of knowledge, swore positively to the bad character of the witness in question, was uncontradicted, and was believed by the jury, they had a right to find that the impeachment was sustained. Held, that the charge was calculated to make the impression on the jury that, if the conditions supposed were found to exist, it was their duty to regard the witness as impeached, and wholly to discard his testimony, without reference to other circumstances affecting his credibility; and a new trial was granted. *Hoyt v. Sturges*, 28 Conn. 539.

The court may limit, at its discretion, the number of impeaching witnesses; though, should the limit be fixed manifestly too low, it might be ground for a new trial. Six on a side will ordinarily be sufficient. *Bunnell v. Butler*, 23 Conn. 69.

An impeaching witness may be asked on cross-examination how he has received his information as to the general character of the witness impeached, and what persons he has heard speak against it. *Weeks v. Hull*, 19 Conn. 379.

MASSACHUSETTS.

The party whose witness is attacked may give evidence in support of his reputation. *Com. v. Ingraham*, 7 Gray, 46, 48.

An impeaching witness may be cross-examined as to the source of his information. *Bates v. Barber*, 4 Cush. 107.

Particular instances of falsehood cannot be shown. *Com. v. Rogers*,

136 Mass. 158, 159; *Quinsigamond Bank v. Hobbs*, 11 Gray, 250; *Com. v. Lawler*, 12 Allen, 585; *Com. v. Kennon*, 130 Mass. 39.

While a party may disprove a fact testified to by his witness, he cannot impeach him under the rule of this article. *Hill v. West End St. R. R. Co.*, 158 Mass. 458; *Brolley v. Lapham*, 13 Gray, 294; *Com. v. Welsh*, 4 Gray, 535; *Com. v. Starkweather*, 10 Cush. 59; *Whitaker v. Salisbury*, 15 Pick. 534; *Whitney v. Eastern R. R. Co.*, 9 Allen, 364; *Brown v. Bellows*, 4 Pick. 179.

Reputation eighteen months before may be shown. *Com. v. Billings*, 97 Mass. 405.

One who knows nothing of the character of a witness, except what he heard on two occasions, cannot testify as an impeaching witness. *Com. v. Rogers*, 136 Mass. 158. As to qualification, generally, see *Bates v. Barber*, 4 Cush. 107; *Wetherbee v. Norris*, 103 Mass. 565; *Rundell v. La Fleur*, 6 Allen, 480.

This rule applies also to a witness which he is obliged to call, as an attesting witness. *Brown v. Bellows*, 4 Pick. 179, 194; *Whitaker v. Salisbury*, 15 Pick. 534.

ARTICLE 134.

OFFENCES AGAINST WOMEN.

When a man is prosecuted for rape or an attempt to ravish, it may be shown that the woman against whom the offence was committed was of a generally immoral character, although she is not cross-examined on the subject.³⁵ The woman may in such a case be asked whether she has had connection with other men, but her answer cannot be contradicted.³⁶ She may also be asked whether she has had connection on other occasions with the prisoner, and if she denies it she may be contradicted.³⁷

³⁵ *R. v. Clarke*, 1817, 2 Star. 241.

³⁶ *R. v. Holmes*, 1871, 1 C. C. R. 334.

³⁷ *R. v. Martin*, 1834, 6 C. & P. 562, and remarks in *R. v. Holmes*, p. 337, per Kelly, C.B. See also *R. v. Cockroft*, 1870, 11 Cox 410; 41 L. J., M. C., 12, and *R. v. Riley*, 1887, 18 Q. B. D. 481.

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), sec. 458, n. vol. 3, sec. 214.

Such acts, unless with the accused, may not be proved in some States. *State v. Forstner*, 43 N. H. 89; *State v. Knapp*, 45 N. H. 148.

As to indecent assault, see *Mitchell v. Work*, 13 R. I. 645. Particular acts of unchastity with others, cannot be proved. *Gore v. Curtes*, 81 Me. 403.

MASSACHUSETTS.

The bad character of woman for chastity may be shown. *Com. v. McDonald*, 110 Mass. 405. Particular acts with other men cannot be shown. *Com. v. Harris*, 131 Mass. 336; *Com. v. Regan*, 105 Mass. 593.

ARTICLE 135.

WHAT MATTERS MAY BE PROVED IN REFERENCE TO
DECLARATIONS RELEVANT UNDER ARTICLES 25-32.

Whenever any declaration or statement made by a deceased person relevant or deemed to be relevant under Articles 25-32, both inclusive, or any deposition is proved all matters may be proved in order to contradict it, or in order to impeach or confirm the credit of the person by whom it was made which might have been proved if that person had been called as a witness, and had denied upon cross-examination the truth of the matter suggested.³⁸

³⁸ *R. v. Drummond*, 1784, 1 Lea. 337; *R. v. Pike*, 1829, 3 C. & L. 598. In these cases dying declarations were excluded, because the persons by whom they were made would have been incompetent as witnesses, but the principle would obviously apply to all the cases in question.

AMERICAN NOTE.

GENERAL.

Authority.—1 Greenleaf on Evidence (15th ed.), sec. 163.

MASSACHUSETTS.

Com. v. Cooper, 5 Allen, 495.

ARTICLE 136.

REFRESHING MEMORY.

A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the judge considers it likely that the transaction was at that time fresh in his memory.

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.³⁹

An expert may refresh his memory by reference to professional treatises.⁴⁰

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), secs. 436–438; 8 Encyclopædia of Pleading and Practice, p. 135; *Downer v. Rowell*, 24 Vt. 343; *Kelsea v. Fletcher*, 48 N. H. 282; *Davis v. Field*, 56 Vt. 426; *Chamberlain v. Sands*, 27 Me. 458; *Pinney v. Andrus*, 41 Vt. 631; *Chamberlain v. Ossipee*, 60 N. H. 212; *Welcome v. Batchelder*, 23 Me. 85.

³⁹ 2 Ph. Ev. 480, &c.; Taylor, ss. 1406–1413; R. N. P. 175–6; Phipson, 471–474.

⁴⁰ *Sussex Peerage Case*, 1844, 11 C. & F. 114–117.

CONNECTICUT.

Card v. Foot, 56 Conn. 369; *Erie v. Miller*, 52 Conn. 446; *Norwalk v. Ireland*, 68 Conn. 13.

A plaintiff had testified that she had earned the money invested in certain bonds in large part in her business as a milliner and that she had a high class of customers. She was asked the names of her customers, and in answering was allowed to refresh her recollection by referring to a list of them made by her son upon her dictation. Held, to be no error. *Card v. Foot*, 56 Conn. 374.

A witness may refer to memoranda made by himself or others for the purpose of refreshing his recollection, and it is of no consequence whether the memoranda thus referred to are originals or copies; they are solely for the use of the witness and are not evidence to go to the jury. *Erie Preserving Co. v. Miller*, 52 Conn. 446.

MASSACHUSETTS.

Morrison v. Chapin, 97 Mass. 72; *Coffin v. Vincent*, 12 Cush. 98; *Fletcher v. Powers*, 131 Mass. 333; *Alvord v. Collin*, 20 Pick. 418; *Crittenden v. Rogers*, 8 Gray, 452; *Parsons v. Manufacturers' Ins. Co.*, 16 Gray, 463; *Com. v. Jeffs*, 132 Mass. 5; *Com. v. Ford*, 130 Mass. 64; *Com. v. Clancy*, 154 Mass. 128; *Com. v. Watson*, 154 Mass. 135; *Dugan v. Mahoney*, 11 Allen, 572.

A writing, under this article, is not evidence. *Field v. Thompson*, 119 Mass. 151.

A witness may be required to look at a memorandum. *Chapin v. Lapham*, 20 Pick. 467.

The witness need have no present recollection. *Dugan v. Mahoney*, 11 Allen, 572; *Coffin v. Vincent*, 12 Cush. 98; *Morrison v. Chapin*, 97 Mass. 72; *Com. v. Jeffs*, 132 Mass. 5; *Costello v. Crowell*, 133 Mass. 352.

The paper need not have been written by the witness. *Com. v. Ford*, 130 Mass. 64; *Chapin v. Lapham*, 20 Pick. 467; *Coffin v. Vincent*, 12 Cush. 98.

ARTICLE 137.

RIGHT OF ADVERSE PARTY AS TO WRITING USED TO REFRESH
MEMORY.

Any writing referred to under Article 136 must be produced and shown to the adverse party if he requires it; and such party may, if he pleases, cross-examine the witness thereupon.⁴¹ •

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), sec. 437 *et seq.*; 8 Encyclopædia of Pleading and Practice, p. 142; *State v. Bacon*, 41 Vt. 526, 98 Am. Dec. 616.

MASSACHUSETTS.

Com. v. Haley, 13 Allen, 587; *Com. v. Burke*, 114 Mass. 261; *Dugan v. Mahoney*, 11 Allen, 573.

ARTICLE 138.

GIVING, AS EVIDENCE, DOCUMENT CALLED FOR AND
PRODUCED ON NOTICE.

When a party calls for a document which he has given the other party notice to produce, and such document is produced to and inspected by, the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so, and if it is or is deemed to be relevant.⁴²

⁴¹ See Cases in R. N. P. 176.

⁴² *Wharam v. Routledge*, 1805, 5 Esp. 235; *Calvert v. Flower*, 1836, 7 C. & P. 386.

AMERICAN NOTE.

GENERAL.

Authorities.—1 Greenleaf on Evidence (15th ed.), sec. 563; *Merrill v. Merrill*, 67 Me. 70; *Austin v. Thompson*, 45 N. H. 113, 116; *Penobscot Boom Corp. v. Lawson*, 16 Me. 224; *Blake v. Russ*, 33 Me. 360.

The mere production does not make the documents evidence. *Merrill v. Merrill*, 67 Me. 70.

CONNECTICUT.

Contra to text: *Laufer v. Bridgeport Traction Co.*, 68 Conn. 485.

MASSACHUSETTS.

Clark v. Fletcher, 1 Allen, 53, 57; *Long v. Drew*, 114 Mass. 77.

ARTICLE 139.

USING, AS EVIDENCE, A DOCUMENT PRODUCTION OF WHICH
WAS REFUSED ON NOTICE.

When a party refuses to produce a document which he has had notice to produce, he may not afterwards use the document as evidence without the consent of the other party.⁴³

⁴³ *Doe v. Hodgson*, 1840, 12 A. & E. 135; but see remarks in 2 Ph. Ev. 270.

CHAPTER XVII.

OF DEPOSITIONS.

ARTICLE 140.

DEPOSITIONS BEFORE MAGISTRATES.

A DEPOSITION taken under 11 & 12 Vict. c. 42, s. 17, may be produced and given in evidence at the trial of the person against whom it was taken,

if it is proved [to the satisfaction of the judge] that the witness is dead, or so ill as not to be able to travel [although there may be a prospect of his recovery];¹

[or, if he is kept out of the way by the person accused]² or, [probably if he is too mad to testify,]³ and

if the deposition purports to be signed by the justice by or before whom it purports to have been taken; and

if it is proved by the person who offers it as evidence that it was taken in the presence of the person accused, and that he, his counsel, or attorney, had a full opportunity of cross-examining the witness;

Unless it is proved that the deposition was not in fact signed by the justice by whom it purports to be signed

[or, that the statement was not taken upon oath;

¹ *R. v. Stephenson*, 1862, L. & C. 165.

² *R. v. Scaife*, 1851, 17 Q. B. 238.

³ Analogy of *R. v. Scaife*.

or [perhaps] that it was not read over to or signed by the witness].⁴

If there is a prospect of the recovery of a witness proved to be too ill to travel, the judge is not obliged to receive the deposition, but may postpone the trial.⁵

AMERICAN NOTE.

GENERAL.

Depositions.—6 Encyclopædia of Pleading and Practice, p. 471.

CONNECTICUT.

Gen. Stats., secs. 1077, 1068–1083, 1626; Pub. Acts of 1897, p. 859.

It is within the power of the Superior Court to refuse to admit a deposition to be read in evidence when the deponent has refused to answer a question; but the Supreme Court cannot say that it is an error not to do so. It is a matter lying largely, if not wholly, in the discretion of the court. *Thill's Sons & Co. v. Perkins Electric Lamp Co.*, 63 Conn. 485.

In this case it did not appear that the counsel did not ask for any rule requiring the witness to answer, and it was held, that there was enough to warrant the court in refusing to exclude the deposition. *Thill's Sons & Co. v. Perkins Electric Lamp Co.*, 63 Conn. 486.

MASSACHUSETTS.

Pub. Stats., chap. 212, secs. 40, 41; chap. 169, sec. 23 *et seq.*; *Doon v. Donaher*, 113 Mass. 151; *Bogart v. Brown*, 5 Pick. 18; *Gage v. Campbell*, 131 Mass. 566; *Kingman v. Tirrell*, 11 Allen, 97.

⁴ I believe the above to be the effect of 11 & 12 Vict. c. 42, s. 17, as interpreted by the cases referred to, the effect of which is given by the words in brackets, also by common practice. Nothing can be more rambling or ill-arranged than the language of the section itself. See 2 Ph. Ev. 87–100; Taylor, 7th Ed., s. 480.

⁵ *R. v. Tait*, 1861, 2 F. & F. 553.

ARTICLE 141.

DEPOSITIONS UNDER 30 & 31 VICT. C. 35, s. 6.

A deposition taken for the perpetuation of testimony in criminal cases, under 30 & 31 Vict. c. 35, s. 6, may be produced and read as evidence, either for or against the accused, upon the trial of any offender or offence⁶ to which it relates—

if the deponent is proved to be dead, or

if it is proved that there is no reasonable probability that the deponent will ever be able to travel or to give evidence, and

if the deposition purports to be signed by the justice by or before whom it purports to be taken, and

if it is proved to the satisfaction of the Court that reasonable notice in writing⁷ of the intention⁸ to take such deposition was served upon the person (whether prosecutor or accused) against whom it was proposed to be read, and

that such person or his counsel or attorney had or might have had, if he had chosen to be present, full opportunity of cross-examining the deponent.⁸

⁶ *Sic.*

⁷ *R. v. Shurmer*, 1886, 17 Q. B. D. 323.

⁸ 30 & 31 Vict. c. 35, s. 36. The section is very long, and as the first part of it belongs rather to the subject of criminal procedure than to the subject of evidence, I have omitted it. The language is slightly altered. I have not referred to depositions taken before a coroner (see 50 & 51 Vict. c. 71, s. 4), because the section says nothing about the conditions on which they may be given in evidence. Their relevancy, therefore, depends on the common law principles ex-

ARTICLE 141A.

DEPOSITIONS UNDER THE FOREIGN JURISDICTION ACT, 1890.

Where a person is charged with an offence cognizable by a British Court in a foreign country and is liable to be sent for trial to any British possession, he may, before being so sent for trial, tender for examination to the Court in the foreign country any competent witness whose evidence he deems material for his defence, and whom he alleges himself unable to produce at the trial in the British possession ;

and the Court in the foreign country shall proceed in the examination and cross-examination of the witness as though he had been tendered at a trial before that Court, and shall cause the evidence so taken to be reduced into writing, and shall transmit to the Criminal Court of the British possession a copy thereof certified as correct under the seal of the Court before which it was taken, or the signature of the judge of that Court ;

and thereupon the Court of the British possession before which the trial takes place shall allow so much of the evidence so taken as would have been admissible according to the law and practice of that Court, had the witness been produced and examined at the trial, to be read and received as legal evidence at the trial.⁹

pressed in Article 32. They must be signed by the coroner ; but these are matters not of evidence, but of criminal procedure.

⁹ 53 & 54 Vict. c. 37, s. 6.

ARTICLE 141B.

DEPOSITIONS OF CHILDREN.

Where on the trial of any person on indictment for any offence of cruelty within the meaning of the Prevention of Cruelty to Children Act, 1894,¹⁰ or of any of the offences mentioned in the Schedule to the Act,¹¹ the Court is satisfied by the evidence of a registered medical practitioner that the attendance before the Court of any child in respect of whom the offence is alleged to have been committed would involve serious danger to its life or health, any deposition of the child taken under the Indictable Offences Act, 1848, and mentioned in Article 140, or under this Act, as hereinafter mentioned, is admissible in evidence either for or against the accused person without further proof thereof—

¹⁰ The definition of "cruelty" is contained in sect. 1 of the Act, which is as follows:—"If any person over the age of sixteen years who has the custody, charge, or care of any child under the age of sixteen years, wilfully assaults, ill-treats, neglects, abandons, or exposes such child, or causes or procures such child to be assaulted, ill-treated, neglected, abandoned, or exposed in a manner likely to cause such child unnecessary suffering, or injury to its health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement)," &c., &c.

¹¹ *i.e.* offences mentioned in the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), sect. 27 (exposing a child); sect. 55 (abducting a girl under sixteen); sect. 56 (stealing a child); sect. 43 (aggravated assault, if the child is under sixteen); sect. 52 (indecent assault on a female, if she is under sixteen); and any offence under the Children's Dangerous Performances Act, 1879 (42 & 43 Vict. c. 34); and any other offence involving bodily injury to a child under the age of sixteen years.

(a) if it purports to be signed by the justice by or before whom it purports to be taken ; and

(b) if it is proved that reasonable notice of the intention to take the deposition has been served upon the person against whom it is proposed to use the same as evidence, and that that person or his counsel or solicitor had, or might have had if he had chosen to be present, an opportunity of cross-examining the child making the deposition.¹²

Where a justice is satisfied by the evidence of a registered medical practitioner that the attendance before a Court of any child in respect of whom an offence of cruelty,¹³ or any of the offences mentioned in the Schedule to the Act,¹⁴ is alleged to have been committed, would involve serious danger to its life or health, the justice may take in writing the deposition of such child on oath, and shall thereupon subscribe the same, and add thereto a statement of his reason for taking the same, and of the day when and place where the same was taken, and of the names of the persons (if any) present at the taking thereof. The justice taking any such deposition shall transmit the same with his statement—(a) if the deposition relates to an offence for which any accused person is already committed for trial, to the proper officers of the Court, for trial at which the accused person has been committed; and (b) in any other case to the clerk of the peace of the county or borough in which the deposition has been taken.¹⁵

¹² 57 & 58 Vict. c. 41, s. 14.

¹⁴ See Note 11, p. 347.

¹³ See Note 10, p. 347.

¹⁵ 57 & 58 Vict. c. 41, s. 13.

The deposition of the child referred to in this article need not be taken on oath in the case mentioned in Article 123A.

ARTICLE 142.

DEPOSITIONS UNDER MERCHANT SHIPPING ACT, 1894.

¹⁶ Whenever, in the course of any legal proceedings instituted in any part of Her Majesty's dominions before any judge or magistrate or before any person authorised by law or by consent of parties to receive evidence, the testimony of any witness is required in relation to the subject-matter of that proceeding, any deposition that such witness may have previously made on oath in relation to the same subject-matter before any justice or magistrate in Her Majesty's dominions or any British consular officer elsewhere is admissible in evidence, subject to the following restrictions: —

1. If such proceeding is instituted in the United Kingdom or British possessions, due proof must be given that such witness cannot be found in that kingdom or possession respectively.

2. If such deposition was made in the United Kingdom, it is not admissible in any proceeding instituted in the United Kingdom.

3. If the deposition was made in any British possession,

¹⁶ *Id.* c. 60, s. 691. There are some other cases in which depositions are admissible by statute, but they hardly belong to the Law of Evidence.

it is not admissible in any proceeding instituted in that British possession.

4. If the proceeding is criminal the deposition is not admissible unless it was made in the presence of the person accused.

A deposition so made must be authenticated by the signature of the judge, magistrate, or consular officer before whom it was made, and he must certify (if the fact is so) that the accused was present at the taking thereof.

It is not necessary in any case to prove the signature or the official character of the person appearing to have signed any such deposition; and in any criminal proceeding the certificate aforesaid is (unless the contrary is proved) sufficient evidence of the accused having been present in manner thereby certified.

Nothing in this article contained affects any provision by Parliament or by any local legislature as to the admissibility of depositions or the practice of any court according to which depositions not so authenticated are admissible as evidence.

CHAPTER XVIII.

OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE.

ARTICLE 143.

A NEW trial will not be granted in any civil action on the ground of the improper admission or rejection of evidence, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action.¹

If in a criminal case evidence is improperly rejected or admitted, there is no remedy unless the prisoner is convicted, and unless the judge, in his discretion, states a case for the Court for Crown Cases Reserved; but if that Court is of opinion that any evidence was improperly admitted or rejected, it must set aside the conviction.

AMERICAN NOTE.

GENERAL.

Authority.—2 Encyclopædia of Pleading and Practice, p. 1.

CONNECTICUT.

(First paragraph of the text.) *State v. Alford*, 31 Conn. 40; *Morehouse v. Remson*, 59 Conn. 401; *State v. Kinkead*, 57 Conn. 157;

¹ S. C. R., Order XXXIX., 6.

People's Sav. Bank v. Norwalk, 56 Conn. 558; *Bradley v. Bailey*, 56 Conn. 379; *Main's Appeal*, 73 Conn., 48 Atl. 966.

MASSACHUSETTS.

(First paragraph of text.) *Thorndike v. Boston*, 1 Metc. 242; *Richardson v. Warren*, 6 Allen, 552; *Flood v. Clemence*, 106 Mass. 299; *Barry v. Bennett*, 7 Metc. 354; *Holbrook v. Jackson*, 7 Cush. 136; *Tapley v. Forbes*, 2 Allen, 20; *McAvoy v. Wright*, 137 Mass. 207.

APPENDIX OF NOTES

NOTE I.

(TO ARTICLE I.—DEFINITION OF TERMS.)

THE definitions are simply explanations of the senses in which the words defined are used in this work. They will be found, however, if read in connection with my ‘Introduction to the Indian Evidence Act,’ to explain the manner in which it is arranged.

I use the word “presumption” in the sense of a presumption of law capable of being rebutted. A presumption of fact is simply an argument. A conclusive presumption I describe as conclusive proof. Hence the few presumptions of law which I have thought it necessary to notice are the only ones I have to deal with.

In earlier editions of this work I gave the following definition of relevancy.

“Facts, whether in issue or not, are relevant to each other when one is, or probably may be, or probably may have been —

the cause of the other ;

the effect of the other ;

an effect of the same cause ;

a cause of the same effect ;

or when the one shows that the other must or cannot have occurred, or probably does or did exist, or not;

or that any fact does or did exist, or not, which in the common course of events would either have caused or have been caused by the other ;

provided that such facts do not fall within the exclusive rules contained in Chapters III., IV., V., VI. ; or that they do fall within, the exceptions to those rules contained in those chapters."

This was taken (with some verbal alterations) from a pamphlet called ' The Theory of Relevancy for the purpose of Judicial Evidence, by George Clifford Whitworth, Bombay Civil Service. Bombay, 1875.'

The 7th section of the Indian Evidence Act is as follows :
" Facts which are the occasion, cause, or effect, immediate or otherwise, of relevant facts or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant."

The 11th section is as follows : —

" Facts not otherwise relevant are relevant ;

" (1) If they are inconsistent with any fact in issue or relevant fact ;

" (2) If by themselves, or in connection with other facts, they make the existence or non-existence of any fact in issue, or relevant fact, highly probable or improbable."

In my ' Introduction to the Indian Evidence Act,' I examined at length the theory of judicial evidence, and tried to show that the theory of relevancy is only a particular case of the process of induction, and that it depends on

the connection of events as cause and effect. This theory does not greatly differ from Bentham's, though he does not seem to me to have grasped it as distinctly as if he had lived to study Mill's Inductive Logic.

My theory was expressed too widely in certain parts, and not widely enough in others; and Mr. Whitworth's pamphlet appeared to me to have corrected and completed it in a judicious manner. I accordingly embodied his definition of relevancy, with some variations and additions, in the text of the first edition. The necessity of limiting in some such way the terms of the 11th section of the Indian Evidence Act may be inferred from a judgment by Mr. Justice West (of the High Court of Bombay), in the case of *R. v. Parbhudas and others*, printed in the 'Law Journal,' May 27, 1876. I have substituted the present definition for it, not because I think it wrong, but because I think it gives rather the principle on which the rule depends than a convenient practical rule.

As to the coincidence of this theory with English law, I can only say that it will be found to supply a key which will explain all that is said on the subject of circumstantial evidence by the writers who have treated of that subject. Mr. Whitworth goes through the evidence given against the German, Müller, executed for murdering Mr. Briggs on the North London Railway, and shows how each item of it can be referred to one or the other of the heads of relevancy which he discusses.

The theory of relevancy thus expressed would, I believe, suffice to solve every question which can arise upon the subject; but the legal rules based upon an unconscious

apprehension of the theory exceed it at some points and fall short of it at others.

NOTE II.

(TO ARTICLE 2.—RELEVANCE.)

See 1 Ph. Ev. 493, &c.; Best, ss. 111 and 251; Taylor, Pt. II. Ch. II.; Phipson, 49–52.

For instances of relevant evidence held to be insufficient for the purpose for which it was tendered on the ground of remoteness, see *R. v. ———*, 1826, 2 C. & P. 459; and *Mann v. Lang*, 1835, 3 A. & E. 699.

Mr. Taylor (s. 949) adopts from Professor Greenleaf the statement that there is “evidence which the law excludes on public grounds, namely, that which involves the unnecessary disclosure of matter that is indecent or offensive to public morals, or injurious to the feelings of third persons.” The authorities given for this are actions on wagers which the Court refused to try, or in which they arrested judgment, because the wagers were in themselves impertinent and offensive, as, for instance, a wager as to the sex of the Chevalier D'Eon (*Da Costa v. Jones*, 1778; Cowp. 729). No action now lies upon a wager, and I can find no authority for the proposition advanced by Professor Greenleaf. I know of no case in which a fact in issue or relevant to an issue which the Court is bound to try can be excluded merely because it would pain some one who is a stranger to the action. Indeed, in *Da Costa v. Jones*, Lord Mansfield said expressly: “Indecency of evidence is no objection to its being received where it is necessary to the decision of a

civil or criminal right" (p. 734). (See Article 129, and Note XLVI.)

NOTE III.

(TO ARTICLE 4.—ACTS OF CONSPIRATORS.)

On this subject, see also 1 Ph. Ev. 157-164; Taylor, ss. 591-595; Best, s. 508; 1 Russ. on Crimes, 528-532. (See, too, *The Queen's Case*, 1820, 2 Br. & Bing. 309-10.) Phipson, 84-5, 90-1.

The principle is substantially the same as that of principal and accessory, or principal and agent. When various persons conspire to commit an offence each makes the rest his agents to carry the plan into execution. (See, too, Article 17, Note XI.)

NOTE IV.

(TO ARTICLE 5.—RELEVANCY OF FACTS CONSTITUTING TITLE.)

The principle is fully explained and illustrated in *Malcolmon v. O'Dea*, 1862, 10 H. L. C. 593. See particularly the reply to the questions put by the House of Lords to the Judges, delivered by Willes, J., 611-622.

See also 1 Ph. Ev. 234-239; Taylor, ss. 658-667; Best, s. 499.

Mr. Philips and Mr. Taylor treat this principle as an exception to the rule excluding hearsay. They regard the statements contained in the title-deeds as written statements made by persons not called as witnesses. I think the deeds must be regarded as constituting the transactions

which they effect; and in the case supposed in the text, those transactions are actually in issue. When it is asserted that land belongs to A, what is meant is, that A is entitled to it by a series of transactions of which his title-deeds are by law the exclusive evidence (see Article 90). The existence of the deeds is thus the very fact which is to be proved.

Mr. Best treats the case as one of "derivative evidence," an expression which does not appear to me felicitous.

NOTE V.

(TO ARTICLE 8.—STATEMENTS ACCOMPANYING ACTS, COMPLAINTS, &C.)

The items of evidence included in this article are often referred to by the phrase "*res gestæ*," which seems to have come into use on account of its convenient obscurity. The doctrine of "*res gestæ*" was much discussed in the case of *Doe v. Tatham*, 1837. In the course of the argument, Bosanquet, J., observed, "How do you translate *res gestæ*? *gestæ*, by whom?" Parke, B., afterwards observed, "The acts by whomsoever done are *res gestæ*, if relevant to the matter in issue. But the question is, what are relevant?" (7 A. & E. 355.) In delivering his opinion to the House of Lords, the same Judge laid down the rule thus: "Where any facts are proper evidence upon an issue [*i.e.* when they are in issue, or relevant to the issue] all oral or written declarations which can explain such facts may be received in evidence." (Same Case, 4 Bing. N. C. 548.) The question asked by Baron Parke goes to the root

of the whole subject, and I have tried to answer it at length in the text, and to give it the prominence in the statement of the law which its importance deserves.

Besides the cases cited in the illustrations, see cases as to statements accompanying acts collected in 1. Ph. Ev. 152-57; Taylor, ss. 583-91; and Phipson, 236-43. I have stated, in accordance with *R. v. Walker*, 1839, 2 M. & R. 212, that the particulars of a complaint are not admissible; but I have heard Willes, J., rule that they were on several occasions, vouching Parke, B., as his authority. *R. v. Walker* was decided by Parke, B., in 1839. Though he excluded the statement, he said, "The sense of the thing certainly is, that the jury should in the first instance know the nature of the complaint made by the prosecutrix, and all that she then said. But for reasons which I never could understand, the usage has obtained that the prosecutrix's counsel should only inquire generally whether a complaint was made by the prosecutrix of the prisoner's conduct towards her, leaving the prisoner's counsel to bring before the jury the particulars of that complaint by cross-examination."

Lord Bramwell was in the habit, during the latter part of his judicial career, of admitting the complaint itself, and other judges have sometimes done the same. The practice is certainly in accordance with common sense.

The author's note is here left as he wrote it. His own practice on the Bench was the same as that which he ascribes to Willes, J., Parke, B., and Lord Bramwell, and the same course, of admitting the terms of the complaint as part of the evidence for the prosecution, was habitually

followed by Mr. (now Lord) Justice Smith, and the late Mr. Justice Cave, as long as they were Judges of the Queen's Bench Division.

Since the last edition of this work was published, the law on the subject has been enlarged, if not elucidated, by the decision of *R. v. Lillyman*, [1896], 2 Q. B. 167.

The count upon which Lillyman was substantially tried, and upon which alone (*ib.* at p. 170) he was convicted, charged that he unlawfully attempted to have carnal knowledge of a girl under sixteen and over thirteen. The question of her consent was therefore immaterial (Criminal Law Amendment Act, 1885, s. 5, by which the offence was created). In giving her evidence, however, the girl asserted that she did not consent to the attempt. Sir Henry Hawkins admitted evidence of the terms of a complaint made by the girl to her mistress, in the absence of the prisoner, very shortly after the commission of the acts charged. The prisoner was convicted, and the case was reserved on the question whether this evidence was admissible. The Court (Lord Russell, C.J., Pollock, B., Hawkins, Cave, and Wills, J.J.) affirmed the conviction. The ground of the decision is clearly stated in two passages of the judgment of the Court, delivered by Sir Henry Hawkins. "It [the complaint] is clearly not admissible as evidence of the facts complained of. . . . The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as being inconsistent with her consent to that of which she complains" (*ib.* at p. 170). "The evidence is admissible only upon the ground that it was a complaint of that which

is charged against the prisoner, and can be legitimately used only for the purpose of enabling the jury to judge for themselves whether the conduct of the woman was consistent with her testimony on oath given in the witness-box negating her consent, and affirming that the acts complained of were against her will, and in accordance with the conduct they would expect in a truthful woman under the circumstances detailed by her " (*ib.* at p. 177). In other words, the judgment decides that where a woman has made a statement as to her own consent, which in the case before the Court happened to be perfectly irrelevant, the details of her complaint may be admitted only because they may serve as a test of the credibility which ought to attach to the relevant parts of her testimony.

This view was reiterated by Sir Henry Hawkins in the case of *R. v. Rowland* tried at the Chelmsford Summer Assizes, 1898 (*Times*, July 6, 1898), when he refused to admit evidence of the terms of a complaint, though the charge was one of rape; but, it must be inferred, the woman's consent was practically not in issue. The judge said, " All that *R. v. Lillyman* decided was that the terms of a complaint were only admissible as evidence of a want of consent by the prosecutrix, and not as evidence of the truth of the charge against the person named in the complaint." As to this decision it must be remarked that even if the woman's consent was not in issue, and if nothing but the prisoner's identity was disputed, the woman's want of consent must have formed part of the story deposed to by her, and the distinction between this case, where consent was certainly a relevant matter, and *Lillyman's* case, where

it certainly was not, is not apparent. The same judge, in *Beatty v. Cullingworth*, 1896, 60 J. P. 740, a civil suit for an assault, held at the principle of *R. v. Lillyman* applied only to prosecutions for rape and similar offences, and rejected evidence either of a complaint having been made, or of the terms of the complaint, it is not clear which, but probably the latter. His decision was approved of in the Court of Appeals, *Times*, January 14, 1897.

It is not easy to see why evidence of the terms of a complaint should be admissible in order to test credibility on one point only; and the Recorder of London seems to hold there is no such restriction. In *R. v. Folley*, [1896], 60 J. P. 569, the prisoner and his wife were together in a room, cries were heard, and the wife came out suffering from a wound. At the trial the wife deposed that she had herself inflicted the wound. The Recorder, after referring to *R. v. Lillyman*, said, "that he should hold that the principle of that case applied to all cases," and allowed a constable to be recalled, who deposed that the wife in giving him an account of what happened, said, "Mr. Folley done it." Here there was no question of consent.

The total result is that the law is not easy to state with confidence, and in practice the administration of it is believed not to be uniform. On the Northern Circuit the details of complaints have, since Lillyman's case, been admitted in all cases of sexual offences against women and girls, whether or not the question of consent was, in fact or legally, at issue; and a similar practice seems to obtain more or less uniformly on other circuits and at the Old Bailey.

NOTE VI.

(TO ARTICLES 10, 11, 12.—RELEVANCE OF SIMILAR
FACTS, SYSTEM, &C.)

Article 10 is equivalent to the maxim, "*Res inter alios acta alteri nocere non debet*," which is explained and commented on in Best, ss. 506-510 (though I should scarcely adopt his explanation of it), and by Broom ('Maxims,' 908-922). The application of the maxim to the Law of Evidence is obscure, because it does not show how unconnected transactions should be supposed to be relevant to each other. The meaning of the rule must be inferred from the exceptions to it stated in Articles 11 and 12, which show that it means, You are not to draw inferences from one transaction to another which is not specifically connected with it merely because the two resemble each other. They must be linked together by the chain of cause and effect in some assignable way before you can draw your inference.

In its literal sense the maxim also fails, because it is not true that a man cannot be affected by transactions to which he is not a party. Illustrations to the contrary are obvious and innumerable; bankruptcy, marriage, indeed every transaction of life, would supply them.

The exceptions to the rule given in Articles 11 and 12 are generalised from the cases referred to in the Illustrations. It is important to observe that though the rule is expressed shortly, and is sparingly illustrated, it is of very much greater importance and more frequent application than the exceptions. It is indeed one of the most charac-

teristic and distinctive parts of the English Law of Evidence, for this is the rule which prevents a man charged with a particular offence from having either to submit to imputations which in many cases would be fatal to him, or else to defend every action of his whole life in order to explain his conduct on the particular occasion. A statement of the Law of Evidence which did not give due prominence to the four great exclusive rules of evidence of which this is one would neither represent the existing law fairly nor in my judgment improve it.

The exceptions to the rule apply more frequently to criminal than to civil proceedings, and in criminal cases the Courts are always disinclined to run the risk of prejudicing the prisoner by permitting matters to be proved which tend to show in general that he is a bad man, and so likely to commit a crime. In each of the cases by which Article 12 is illustrated, the evidence admitted went to prove the true character of facts which, standing alone, might naturally have been accounted for on the supposition of accident—a supposition which was rebutted by the repetition of similar occurrences. In the case of *R. v. Gray* (Illustration (a)), there were many other circumstances which would have been sufficient to prove the prisoner's guilt, apart from the previous fires. That part of the evidence, indeed, seemed to have little influence on the jury. *Garner's Case* (Illustration (c), note) was an extraordinary one, and its result was in every way unsatisfactory. Some account of this case will be found in the evidence given by me before the Commission on Capital Punishments which sat in 1866.

NOTE VII.

(TO ARTICLE 13.— COURSE OF BUSINESS.)

As to presumptions arising from the course of office or business, see Best, s. 403; 1 Ph. Ev. 480-4; Taylor, ss. 176-82. The presumption, "*Omnia esse rite acta*," also applies. See Broom's '*Maxims*,' 942; Best, ss. 353-65; Taylor, s. 143, &c.; 1 Ph. Ev. 480; and Star. 757, 763.

NOTE VIII.

(TO ARTICLE 14.— HEARSAY.)

The unsatisfactory character of the definitions usually given as hearsay is well-known. See Best, s. 495; Taylor, ss. 567-70.¹ The definition given by Mr. Philips sufficiently exemplifies it: "When a witness, in the course of

¹ See, too, Phipson, pp. 200-204; particularly at p. 202, where Sir James Stephen's account of the objection to hearsay as evidence, is criticised on the ground that it ignores the possibility of the relevancy of the fact which hearsay alleges to have been stated, and that the objection to its being stated by a non-witness ought to be considered under the head of proof in answer to the question how relevant facts may be proved. The answer is that the leading feature of hearsay is that it proves a statement by a non-witness, which, taken alone, does not come within the definition of "*relevant*," and that it is therefore better treated of when considering the question, What may be proved? than in dealing with the subsequent question, How may a relevant fact be proved? The practical advantage of the author's method of treatment is that he separates admissions and confessions which owe their force to the circumstances under which they are made, from public and other formal documents which for purposes of convenience are made evidence by the operation of the law.

stating what has come under the cognizance of his own sensés concerning a matter in dispute, *states the language of others which he has heard*, or produces papers which he identifies as being written by particular individuals, he offers what is called hearsay evidence. This evidence may sometimes be the very matter in dispute," &c. (1 Ph. Ev. 143). If this definition is correct, the maxim, "Hearsay is no evidence," can only be saved from the charge of falsehood by exceptions which make nonsense of it. By attaching to it the meaning given in the text it becomes both intelligible and true. There is no real difference between the fact that a man was heard to say this or that, and any other fact. Words spoken may convey a threat, supply the motive for a crime, constitute a contract, amount to slander, &c., &c.; and if relevant or in issue, on these or other grounds, they must be proved, like other facts, by the oath of some one who heard them. The important point to remember about them is that bare assertion must not, generally speaking, be regarded as relevant to the truth of the matter asserted.

The doctrine of hearsay evidence was fully discussed by many of the judges in the case of *Doe d. Wright v. Tatham*, 1837, on the different occasions when that case came before the Court (see 7 A. & E. 313-408; 4 Bing. N. C. 489-573). The question was whether letters addressed to a deceased testator, implying that the writers thought him sane, but not acted upon by him, could be regarded as relevant to his sanity, which was the point in issue. The case sets the stringency of the rule against hearsay in a light which is forcibly illustrated by a passage in the judgment

of Baron Parke (7 A. & E. 385-8), to the following effect: — He treats the letters as “statements of the writers, not on oath, of the truth of the matter in question, with this in addition, that they had acted upon the statements on the faith of their being true by their sending the letters to the testator.” He then goes through a variety of illustrations which had been suggested in argument, and shows that in no case ought such statements to be regarded as relevant to the truth of the matter stated, even when the circumstances were such as to give the strongest possible guarantee that such statements expressed the honest opinions of the persons who made them. Amongst others he mentions the following: — “The conduct of the family or relations of a testator taking the same precautions in his absence as if he were a lunatic — his election in his absence to some high and responsible office; the conduct of a physician who permitted a will to be executed by a sick testator; the conduct of a deceased captain on a question of seaworthiness, who, after examining every part of a vessel, embarked in it with his family; all these, when deliberately considered, are, with reference to the matter in issue in each case, mere instances of hearsay evidence — mere statements, not on oath, but applied in or vouched by the actual conduct of persons by whose acts the litigant parties are not to be bound.” All these matters are therefore to be treated as irrelevant to the questions at issue.

These observations make the rule quite distinct, but the reason suggested for it in the concluding words of the passage extracted appears to be weak. That passage im-

plies that hearsay is excluded because no one "ought to be bound by the act of a stranger." That no one shall have power to make a contract for another or commit a crime for which that other is to be responsible without his authority is obviously reasonable, but it is not so plain why A's conduct should not furnish good grounds for inference as to B's conduct, though it was not authorised by B. The importance of shortening proceedings, the importance of compelling people to procure the best evidence they can, and the importance of excluding opportunities of fraud, are considerations which probably justify the rule excluding hearsay; but Baron Parke's illustrations of its operation clearly prove that in some cases it excludes the proof of matter which, but for it, would be regarded not only as relevant to particular facts, but as good grounds for believing in their existence.

NOTE IX.

(TO ARTICLE 15.—ADMISSIONS DEFINED.)

This definition is intended to exclude admissions by pleading, admissions which, if so pleaded, amount to estoppels, and admissions made for the purposes of a cause by the parties or their solicitors. These subjects are usually treated of by writers on evidence; but they appear to me to belong to other departments of the law. The subject, including the matter which I omit, is treated at length in 1 Ph. Ev. 308-401; Taylor, ss. 723-861; and Phipson, 205-235. A vast variety of cases upon admissions of every sort may be found by referring to ROSCOE, N. P. (In-

dex, under the word *Admissions*.) It may perhaps be well to observe that when an admission is contained in a document, or series of documents, or when it forms part of a discourse or conversation, so much and no more of the document, series of documents, discourse or conversation, must be proved as is necessary for the full understanding of the admission, but the judge or jury may of course attach degrees of credit to different parts of the matter proved. This rule is elaborately discussed and illustrated by Mr. Taylor, ss. 725-38. It has lost much of the importance which attached to it when parties to actions could not be witnesses, but could be compelled to make admissions by bills of discovery. The ingenuity of equity draughtsmen was under that system greatly exercised in drawing answers in such a form that it was impossible to read part of them without reading the whole, and the ingenuity of the Court was at least as much exercised in countermining their ingenious devices. The power of administering interrogatories, and of examining the parties directly, has made great changes in these matters.

NOTE X.

(TO ARTICLE 16.—ADMISSIONS, BY WHOM MADE.)

As to admissions by parties, see *Moriarty v. L. C. & D. Railway*, 1870, L. R. 5 Q. B. 320, per Blackburn, J.; *Alner v. George*, 1808, 1 Camp. 392; *Bauerman v. Radenius*, 1798, 7 T. R. 663.

As to admissions by parties interested, see *Spargo v. Brown*, 1829, 9 B. & C. 935.

See also on the subject of this article, 1 Ph. Ev. 362-3, 369, 398; Taylor, ss. 740-3, 755-7, 794; Roscoe, N. P. 67; and Phipson, 215-35.

As to admissions by privies, see 1 Ph. Ev. 394-7, and Taylor (from Greenleaf), s. 787.

NOTE XI.

(TO ARTICLE 17.— ADMISSIONS BY AGENTS.)

The subject of the relevancy of admissions by agents is rendered difficult by the vast variety of forms which agency assumes, and by the distinction between an agent for the purpose of making a statement and an agent for the purpose of transacting business. If A sends a message by B, B's words in delivering it are in effect A's; but B's statements in relation to the subject-matter of the message have, as such, no special value. A's own statements are valuable if they suggest an inference which he afterwards contests because they are against his interest; but when the agent's duty is done, he has no special interest in the matter.

The principle as to admissions by agents is stated and explained by Sir W. Grant in *Fairlie v. Hastings*, 1804, 10 Ve. 126-7.

NOTE XII.

(TO ARTICLE 18.— ADMISSIONS BY STRANGERS.)

See, for a third exception (which could hardly occur now), *Clay v. Langslow*, 1827, M. & M. 45.

NOTE XIII.

(TO ARTICLE 19.—ADMISSIONS BY PARTY REFERRED TO.)

This comes very near to the case of arbitration. See, as to irregular arbitrations of this kind, 1 Ph. Ev. 383; Taylor, ss. 760-3; Phipson, 233-4.

NOTE XIV.

(TO ARTICLE 20.—ADMISSIONS WITHOUT PREJUDICE.)

See more on this subject in 1 Ph. Ev. 326-8; Taylor, ss. 774, 795; R. N. P. 62-3; Phipson, 207-8.

NOTE XV.

(TO ARTICLE 22.—CONFESSIONS UNDER THREAT.)

On the law as to Confessions, see 1 Ph. Ev. 401-423; Taylor, ss. 872-84, and s. 902; Best, ss. 551-74; Roscoe, Cr. Ev. 34-49; 3 Russ. on Crimes, by Greaves, 477-537; Phipson, 244-55. Joy on Confessions reduces the law on the subject to the shape of 13 propositions, the effect of all of which is given in the text in a different form.

Many cases have been decided as to the language which amounts to an inducement to confess (see Roscoe, Cr. Ev. 35-38; and Phipson, 250-3, where most of them are collected). They are, however, for practical purposes, summed up in *R. v. Baldry*, 1852, 2 Den. 430, which is the authority for the last lines of the first paragraph of this article.

NOTE XVI.

(TO ARTICLE 23.—CONFESSIONS ON OATH.)

Cases are sometimes cited to show that if a person is examined as a witness on oath, his deposition cannot be used in evidence against him afterwards (see Taylor, ss. 886 and 895, n. 5; also 3 Russ. on Cri. 511, &c.). All these cases, however, relate to the examinations before magistrates of persons accused of crimes, under the statutes which were in force before 11 & 12 Vict. c. 42, and which, like that statute, authorised statements by prisoners, but not their examination on oath.

Since the decisions in *R. v. Scott*, 1856, 1 D. & B. 47; 25 L. J., M. C. 128, and *R. v. Erdheim* [1896], 2 Q. B. 260, decided on the Bankruptcy Acts of 1849 and 1883, it seems that these cases must be considered obsolete; see particularly the judgment of Russell, L.C.J., in the latter case, at pp. 267–8. The point is of considerable importance since the passing of the Criminal Evidence Act, 1898.

NOTE XVII.

(TO ARTICLE 26.—DYING DECLARATIONS.)

As to dying declarations, see 1 Ph. Ev. 239–52; Taylor, ss. 714–22; Best, s. 505; Starkie, 32 & 38; 3 Russ. Cri. 388–97; Roscoe, Crim. Ev. 27–33; Phipson, 298–303; *R. v. Baker*, 2 Mo. & Ro., 1837, 53, is a curious case on this subject. A and B were both poisoned by eating the same cake. C was tried for poisoning A. B's dying de-

claration that she made the cake in C's presence, and put nothing bad in it, was admitted as against C, on the ground that the whole formed one transaction.

NOTE XVIII.

(TO ARTICLE 27.—DECLARATIONS IN COURSE OF BUSINESS.)

1 Ph. Ev. 280-300; Taylor, ss. 714-22; Best, 501; R. N. P. 60-2; Phipson, 268-75; and see note to *Price v. Lord Torrington*, 1704, 2 S. L. C. 310. The last case on the subject is *Massey v. Allen*, 1879, 13 Ch. Div. 558.

NOTE XIX.

(TO ARTICLE 28.—DECLARATIONS AGAINST INTEREST.)

The best statement of the law upon this subject will be found in *Higham v. Ridgway*, and the note thereto, 2 S. L. C. 317-8. See also 1 Ph. Ev. 253-80; Taylor, ss. 668-96A; Best, s. 500; R. N. P. 55-59; Phipson, 258-67.

A class of cases exists which I have not put into the form of an article, partly because their occurrence since the commutation of tithes must be very rare, and partly because I find a great difficulty in understanding the place which the rule established by them ought to occupy in a systematic statement of the law. They are cases which lay down the rule that statements as to the receipts of tithes and moduses made by deceased rectors and other ecclesiastical corporations sole are admissible in favour of their successors.

There is no doubt as to the rule (see, in particular, *Short v. Lee*, 1821, 2 Jac. & Wal. 464; and *Young v. Clare Hall*, 1851, 17 Q. B. 529). The difficulty is to see why it was ever regarded as an exception. It falls directly within the principle stated in the text, and would appear to be an obvious illustration of it; but in many cases it has been declared to be anomalous, inasmuch as it enables a predecessor in title to make evidence in favour of his successor. This suggests that Article 28 ought to be limited by a proviso that a declaration against interest is not relevant if it was made by a predecessor in title of the person who seeks to prove it, unless it is a declaration by an ecclesiastical corporation sole, or a member of an ecclesiastical corporation aggregate (see *Short v. Lee*), as to the receipt of a tithe or modus.

Some countenance for such a proviso may be found in the terms in which Bayley, J., states the rule in *Gleadow v. Atkin* (*ante*, p. 107), and in the circumstance that when it first obtained currency the parties to an action were not competent witnesses. But the rule as to the indorsement of notes, bonds, &c., is distinctly opposed to such a view.

NOTE XX.

(TO ARTICLE 30.—DECLARATIONS AS TO PUBLIC AND GENERAL RIGHTS.)

Upon this subject, besides the authorities in the text, see 1 Ph. Ev. 169-97; Taylor, ss. 607-34; Best, s. 497; R. N. P. 48-51; Phipson, 276-87.

A great number of cases have been decided as to the particular documents, &c., which fall within the rule given in

the text. They are collected in the works referred to above, but they appear to me merely to illustrate one or other of the branches of the rule, and not to extend or vary it. An award, *e.g.*, is not within the last branch of illustration (*b*), because it "is but the opinion of the arbitrator, not upon his own knowledge" (*Evans v. Rees*, 1839, 10 A. & E. 155); but the detailed application of such a rule as this is better learnt by experience, applied to a firm grasp of principle, than by an attempt to recollect innumerable cases.

The case of *Weeks v. Sparke* (*ante*, p. 113) is remarkable for the light it throws on the history of the Law of Evidence. It was decided in 1813, and contains *inter alia* the following curious remarks by Lord Ellenborough: "It is stated to be the habit and practice of different circuits to admit this species of evidence upon such a question as the present. That certainly cannot make the law, but it shows at least, from the established practice of a large branch of the profession, and of the judges who have presided at various times on those circuits, what has been the prevailing opinion upon this subject amongst so large a class of persons interested in the due administration of the law. It is stated to have been the practice both of the Northern and Western Circuits. My learned predecessor, Lord Kenyon, certainly held a different opinion, the practice of the Oxford Circuit, of which he was a member, being different." So in the *Berkeley Peerage Case*, 1811, Lord Eldon said, "When it was proposed to read this deposition as a declaration, the Attorney-General (Sir Vicary Gibbs) flatly objected to it. *He spoke quite right as a Western Circuiter*,

of what he had often heard laid down in the West, and never heard doubted" (4 Cam. 20). This shows how very modern much of the Law of Evidence is. Le Blanc, J., in *Weeks v. Sparke*, says, that a foundation must be laid for evidence of this sort "by acts of enjoyment within living memory." This seems superfluous, as no jury would ever find that a public right of way existed, which had not been used in living memory, on the strength of a report that some deceased person had said that there once was such a right.

NOTE XXI.

(TO ARTICLE 31.—DECLARATIONS AS TO PEDIGREE.)

See 1 Ph. Ev. 197-233; Taylor, ss. 635-57; R. N. P. 46-48; Phipson, 288-297.

The *Berkeley Peerage Case*, 1811 (Answers of the Judges to the House of Lords), 4 Cam. 401, which established the third condition given in the text; and *Davies v. Lowndes*, 1843, 6 M. & G. 471 (see more particularly pp. 525-9, in which the question of family pedigrees is fully discussed) are specially important on this subject.

As to declarations as to the place of birth, &c., see *Shields v. Boucher*, 1847, 1 De G. & S. 49-58.

NOTE XXII.

(TO ARTICLE 32.—EVIDENCE IN FORMER PROCEEDINGS.)

See also 1 Ph. Ev. 306-8; Taylor, ss. 464-79A; Buller, N. P. 238, and following; Phipson, 419-25.

In reference to this subject it has been asked whether this principle applies indiscriminately to all kinds of evidence in all cases. Suppose a man were to be tried twice upon the same facts—*e. g.* for robbery after an acquittal for murder, and suppose that in the interval between the two trials an important witness who had not been called before the magistrates were to die, might his evidence be read on the second trial from a reporter's short-hand notes? This case might easily have occurred if Orton had been put on his trial for forgery as well as for perjury. I should be disposed to think on principle that such evidence would be admissible, though I cannot cite any authority on the subject. The common law principle on which depositions taken before magistrates and in Chancery proceedings were admitted seems to cover the case.

NOTE XXIII.

(TO ARTICLES 39-47.—JUDGMENTS AS EVIDENCE.)

The law relating to the relevancy of judgments of Courts of Justice to the existence of the matters which they assert is made to appear extremely complicated by the manner in which it is usually dealt with. The method commonly employed is to mix up the question of the effect of judgments of various kinds with that of their admissibility, subjects which appear to belong to different branches of the law.

Thus the subject, as commonly treated, introduces into the Law of Evidence an attempt to distinguish between judgments *in rem*, and judgments *in personam* or *inter*

partes (terms adapted from, but not belonging to, Roman Law, and never clearly defined in reference to our own or any other system); also the question of the effect of the pleas of *autrefois acquit*, and *autrefois convict*, which clearly belong not to evidence, but to criminal procedure; the question of estoppels, which belongs rather to the law of pleading than to that of evidence; and the question of the effect given to the judgments of foreign Courts of Justice, which would seem more properly to belong to private international law. These and other matters are treated of at great length in 2 Ph. Ev. 1-78, and Taylor, ss. 1667-1723; in the note to the *Duchess of Kingston's Case*, 1776, 2 S. L. C. 726-840; and Phipson, 379-412. Best (ss. 588-595) treats the matter more concisely.

The text is confined to as complete a statement as I could make of the principles which regulate the relevancy of judgments considered as declarations proving the facts which they assert, whatever may be the effect or the use to be made of those facts when proved. Thus the leading principle stated in Article 40 is equally true of all judgments alike. Every judgment, whether it be *in rem* or *inter partes*, must and does prove what it actually effects, though the effects of different sorts of judgments differ as widely as the effects of different sorts of deeds.

There has been much controversy as to the extent to which effect ought to be given to the judgments of foreign Courts in this country, and as to the cases in which the Courts will refuse to act upon them; but as a mere question of evidence, they do not differ from English judgments.

The cases on foreign judgments are collected in the note to the *Duchess of Kingston's Case*, 2 S. L. C. 765-801. There is a convenient list of the cases in R. N. P. 205-6. The cases of *Godard v. Gray*, 1870, L. R. 6 Q. B. 139; *Castrique v. Imrie*, 1870, L. R. 4 E. & I. A. 414; and *Noewion v. Freeman*, [1889], 15 A. C. 1, are the latest leading cases on the subject.

NOTE XXIV.

(TO CHAPTER V.—OPINIONS, WHEN RELEVANT.)

On evidence of opinions, see 1 Ph. Ev. 520-8; Taylor, ss. 1416-1425; Best, ss. 511-17; R. N. P. 174-5; Phipson, 356-78. The leading case on the subject is *Doe v. Tatham*, 1837, 7 A. & E. 313; and 4 Bing. N. C. 489, referred to above in Note VIII. Baron Parke, in the extracts there given, treats an expression of opinion as hearsay, that is, as a statement affirming the truth of the subject-matter of the opinion.

NOTE XXV.

(TO CHAPTER VI.—CHARACTER, WHEN RELEVANT.)

See 1 Ph. Ev. 502-8; Taylor, ss. 349-63; Best, ss. 257-63; 3 Russ. Cr. 424-8; Phipson, 154-8. The subject is considered at length in *R. v. Rowton*, 1865, 1 L. & C. 520. One consequence of the view of the subject taken in that case is that a witness may with perfect truth swear that a man, who to his knowledge has been a receiver of stolen goods for years, has an excellent character for honesty, if he has had the good luck to conceal his crimes from his

neighbours. It is the essence of successful hypocrisy to combine a good reputation with a bad disposition, and according to *R. v. Rowton*, the reputation is the important matter. The case is seldom if ever acted on in practice. The question always put to a witness to character is, What is the prisoner's character for honesty, morality, or humanity? as the case may be; nor is the witness ever warned that he is to confine his evidence to the prisoner's reputation. It would be no easy matter to make the common run of witnesses understand the distinction.

NOTE XXVI.

(TO ARTICLE 58.—JUDICIAL NOTICE.)

The list of matters judicially noticed in this article is not intended to be quite complete. It is compiled from 1 Ph. Ev. 458-67, and Taylor, ss. 4-21, where the subject is gone into more minutely. A convenient list is also given in R. N. P. 80-84, which is much to the same effect; see, too, Phipson, 16-24. It may be doubted whether an absolutely complete list could be formed, as it is practically impossible to enumerate everything which is so notorious in itself, or so distinctly recorded by public authority, that it would be superfluous to prove it. Paragraph (1) is drawn with reference to the fusion of Law, Equity, Admiralty, and Testamentary Jurisdiction effected by the Judicature Act.

NOTE XXVII.

(TO ARTICLE 62.—ORAL EVIDENCE MUST BE DIRECT.)

Owing to the ambiguity of the word “evidence,” which is sometimes used to signify the effect of a fact when proved, and sometimes to signify the testimony by which a fact is proved, the expression “hearsay is no evidence” has many meanings. Its common and most important meaning is the one given in Article 14, which might be otherwise expressed by saying that the connection between events, and reports that they have happened, is generally so remote that it is expedient to regard the existence of the reports as irrelevant to the occurrence of the events, except in excepted cases. Article 62 expresses the same thing from a different point of view, and is subject to no exceptions whatever. It asserts that whatever may be the relation of a fact to be proved to the fact in issue, it must, if proved by oral evidence, be proved by direct evidence. For instance, if it were to be proved under Article 31 that A, who died fifty years ago, said that he had heard from his father B, who died 100 years ago, that A’s grandfather C had told B that D, C’s elder brother, died without issue, A’s statement must be proved by some one who, with own ears, heard him make it. If (as in the case of verbal slander) the speaking of the words was the very point in issue, they must be proved in precisely the same way. Cases in which evidence is given of character and general opinion may perhaps seem to be exceptions to this rule,

but they are not so. When a man swears that another has a good character, he means that he has heard many people, though he does not particularly recollect what people, speak well of him, though he does not recollect all that they said.

NOTE XXVIII.

(TO ARTICLES 66 & 67.—PROOF OF EXECUTION OF DOCUMENT MUST BE ATTESTED.)

This is probably the most ancient, and is, as far as it extends, the most inflexible of all the rules of evidence. The following characteristic observations by Lord Ellenborough occur in *R. v. Harringworth*, 1815, 4 M. & S. at p. 353:—

“The rule, therefore, is universal that you must first call the subscribing witness; and it is not to be varied in each particular case by trying whether, in its application, it may not be productive of some inconvenience, for then there would be no such thing as a general rule. *A lawyer who is well stored with these rules would be no better than any other man that is without them*, if by mere force of speculative reasoning it might be shown that the application of such and such a rule would be productive of such and such an inconvenience, and therefore ought not to prevail; but if any general rule ought to prevail, this is certainly one that is as fixed, formal, and universal as any that can be stated in a Court of Justice.”

In *Whyman v. Garth*, 1853, 8 Ex. at p. 807, Pollock, C.B., said, “The parties are supposed to have agreed *inter*

se that the deed shall not be given in evidence without his [the attesting witness] being called to depose to the circumstances attending its execution.”

In very ancient times, when the jury were witnesses as to matter of fact, the attesting witnesses to deed (if a deed came in question) would seem to have been summoned with, and to have acted as a sort of assessors to, the jury. See as to this, Bracton, fo. 38a; Fortescue, *De Laudibus*, ch. xxxii. with Selden's note; and cases collected from the Year-books in Brooke's Abridgement, tit. *Testmoignes*.

For the present rule, and the exceptions to it, see 2 Ph. Ev. 242-61; Taylor, ss. 1839-1844; R. N. P. 131-34; Best, ss. 220, &c.; Phipson, 490-95.

The old rule which applied to all attested documents was restricted to those required to be attested by law, by 17 & 18 Vict. c. 125, s. 26, replaced by 28 & 29 Vict. c. 18, ss. 1 & 7, and now repealed by S. L. R. Act, 1892.

NOTE XXIX.

(TO ARTICLE 72.—NOTICE TO PRODUCE.)

For these rules in greater detail, see 1 Ph. Ev. 452-3, and 2 Ph. Ev. 272-89; Taylor, ss. 449-56; R. N. P. 7-14; Phipson, 507-8.

The principle of all the rules is fully explained in the cases cited in the foot-notes, more particularly in *Dwyer v. Collins*, 1852, 7 Ex. 639. In that case it is held that the object of notice to produce is “to enable the party to have the document in Court, and if he does not, to enable

his opponent to give parol evidence...to exclude the argument that the opponent has not taken all reasonable means to procure the original, which he must do before he can be permitted to make use of secondary evidence" (pp. 647-8).

NOTE XXX.

(TO ARTICLE 75.—PUBLIC DOCUMENTS; EXAMINED COPIES.)

Mr. Philips (2, 196) says, that upon a plea of *nul tiel* record, the original record must be produced if it is in the same Court.

Mr. Taylor (s. 1535) says, that upon prosecutions for perjury assigned upon any judicial document the original must be produced. The authorities given seem to me hardly to bear out either of these statements. They show that the production of the original in such cases is the usual course, but not, I think, that it is necessary. The case of *Lady Dartmouth v. Roberts*, 1812, 16 Ea. 334, is too wide for the proposition for which it is cited. The matter, however, is of little practical importance.

NOTE XXXI.

(TO ARTICLES 77 & 78.—PUBLIC DOCUMENTS; EXEMPLIFICATIONS.)

The learning as to exemplifications and office-copies will be found in the following authorities: Gilbert's 'Law of Evidence,' 11-20; Buller, 'Nisi Prius,' 228, and following; Starkie, 256-66 (fully and very conveniently); 2 Ph.

Ev. 196-200; Taylor, ss. 1536-1542; R. N. P. 96-102. The second paragraph of Article 77 is founded on *Appleton v. Braybrook*, 1817, 6 M. & S. at p. 39.

As to exemplifications not under the Great Seal, it is remarkable that the Judicature Acts give no seal to the Supreme Court, or the High Court, or any of its divisions.

NOTE XXXII.

(TO ARTICLE 90.—DOCUMENTS EXCLUSIVE EVIDENCE.)

The distinction between this and the following article is, that Article 90 defines the cases in which documents are exclusive evidence of the transactions which they embody, while Article 91 deals with the interpretation of documents by oral evidence. The two subjects are so closely connected together, that they are not usually treated as distinct; but they are so in fact. A and B make a contract of marine insurance on goods, and reduce it to writing. They verbally agree that the goods are not to be shipped in a particular ship, though the contract makes no such reservation. They leave unnoticed a condition usually understood in the business of insurance, and they make use of a technical expression, the meaning of which is not commonly known. The law does not permit oral evidence to be given of the exception as to the particular ship. It does permit oral evidence to be given to annex the condition; and thus far it decides that for one purpose the document shall, and that for another it shall not, be regarded as exclusive evidence of the terms of the actual agreement

between the parties. It also allows the technical term to be explained, and in doing so it interprets the meaning of the document itself. The two operations are obviously different, and their proper performance depends upon different principles. The first depends upon the principle that the object of reducing transactions to a written form is to take security against bad faith or bad memory, for which reason a writing is presumed as a general rule to embody the final and considered determination of the parties to it. The second depends on a consideration of the imperfections of language, and of the inadequate manner in which people adjust their words to the facts to which they apply.

The rules themselves are not, I think, difficult either to state, to understand, or to remember; but they are by no means easy to apply, inasmuch as from the nature of the case an enormous number of transactions fall close on one side or the other of most of them. Hence the exposition of these rules, and the abridgment of all the illustrations of them which have occurred in practice, occupy a very large space in the different text writers. They will be found in 2 Ph. Ev. 332-424; Taylor, ss. 1128-1228; Star. 648-731; Best (very shortly and imperfectly), ss. 226-9; R. N. P. (an immense list of cases), 16-33; Phipson, 528-75.

As to paragraph (4), which is founded on the case of *Goss v. Lord Nugent*, it is to be observed that the paragraph is purposely so drawn as not to touch the question of the effect of the Statute of Frauds. It was held in effect in *Goss v. Lord Nugent* that if by reason of the Statute of

Frauds the substituted contract could not be enforced, it would not have the effect of waiving part of the original contract; but it seems the better opinion that a verbal rescission of a contract good under the Statute of Frauds would be good. See *Noble v. Ward*, 1867, L. R. 2 Ex. 135, and Pollock on 'Contracts' (6th ed.), 235, note (i). A contract by deed can be released only by deed, and this case also would fall within the proviso to paragraph (4).

The cases given in the illustrations will be found to mark sufficiently the various rules stated. As to paragraph (5), a very large collection of cases will be found in the notes to *Wigglesworth v. Dallison*, 1779, 1 S. L. C., 535-60, but the consideration of them appears to belong rather to mercantile law than to the Law of Evidence. For instance, the question what stipulations are consistent with, and what are contradictory to, the contract formed by subscribing a bill of exchange, or the contract between an insurer and an underwriter, are not questions of the Law of Evidence.

NOTE XXXIII.

(TO ARTICLE 91.—ORAL INTERPRETATION OF DOCUMENTS.)

Perhaps the subject-matter of this article does not fall strictly within the Law of Evidence, but it is generally considered to do so; and as it has always been treated as a branch of the subject, I have thought it best to deal with it.

The general authorities for the propositions in the text are the same as those specified in the last note; but the

great authority on the subject is the work of Vice-Chancellor Wigram on 'Extrinsic Evidence.' Article 91, indeed, will be found, on examination, to differ from the six propositions of Vice-Chancellor Wigram only in its arrangement and form of expression, and in the fact that it is not restricted to wills. It will, I think, be found, on examination, that every case cited by the Vice-Chancellor might be used as an illustration of one or the other of the propositions contained in it.

It is difficult to justify the line drawn between the rule as to cases in which evidence of expressions of intention is admitted and cases in which it is rejected (paragraph 7, illustrations (*k*), (*l*), (*m*), and paragraph 8, illustrations (*n*) and (*o*)). When placed side by side, such cases as *Doe v. Hiscocks* (illustration (*k*)) and *Doe v. Needs* (illustration (*n*)) produce a singular effect. The vagueness of the distinction between them is indicated by the case of *Charter v. Charter*, 1871, L. R. 2 P. & M. 315. In this case the testator Forster Charter appointed "my son Forster Charter" his executor. He had two sons, William Forster Charter and Charles Charter, and many circumstances pointed to the conclusion that the person whom the testator wished to be his executor was Charles Charter. Lord Penzance not only admitted evidence of all the circumstances of the case, but expressed an opinion (p. 319) that, if it were necessary, evidence of declarations of intention might be admitted under the rule laid down by Lord Abinger in *Hiscocks v. Hiscocks*, because part of the language employed ("my son ——— Charter") applied

correctly to each son, and the remainder, "Forster," to neither. This mode of construing the rule would admit evidence of declarations of intention both in cases falling under paragraph 8, and in cases falling under paragraph 7, which is inconsistent not only with the reasoning in the judgment, but with the actual decision in *Doe v. Hiscocks*. It is also inconsistent with the principles of the judgment in the later case of *Allgood v. Blake*, 1873, L. R. 8 Ex. 160, where the rule is stated by Blackburn, J., as follows: "In construing a will, the Court is entitled to put itself in the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used the words in the will, and then to declare what is the intention evidenced by the words used with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words." After quoting Wigram on 'Extrinsic Evidence,' and *Doe v. Hiscocks*, he adds: "No doubt, in many cases the testator has, for the moment, forgotten or overlooked the material facts and circumstances which he well knew. And the consequence sometimes is that he uses words which express an intention which he would not have wished to express, and would have altered if he had been reminded of the facts and circumstances. But the Court is to construe the will as made by the testator, not to make a will for him; and therefore it is bound to execute his expressed intention, even if there is great reason to believe that he has by blunder expressed what he did not mean." The part of

Lord Penzance's judgment above referred to was unanimously overruled in the House of Lords; though the Court, being equally divided as to the construction of the will, refused to reverse the judgment, upon the principle *præsumitur pro negante*.

Conclusive as the authorities upon the subject are, it may not, perhaps, be presumptuous to express a doubt whether the conflict between a natural wish to fulfil the intention which the testator would have formed if he had recollected all the circumstances of the case; the wish to avoid the evil of permitting written instruments to be varied by oral evidence; and the wish to give effect to wills, has not produced in practice an illogical compromise. The strictly logical course, I think, would be either to admit declarations of intention both in cases falling under paragraph 7, and in cases falling under paragraph 8, or to exclude such evidence in both classes of cases, and to hold void for uncertainty every bequest or devise which was shown to be uncertain in its application to facts. Such a decision as that in *Stringer v. Gardiner* (see illustration (*m*)), the result of which was to give a legacy to a person whom the testator had no wish to benefit, and who was not either named or described in his will, appears to me to be a practical refutation of the principle or rule on which it is based.

Of course every document whatever must to some extent be interpreted by circumstances. However accurate and detailed a description of things and persons may be, oral evidence is always wanted to show that persons and things

answering the description exist; and therefore in every case whatever, every fact must be allowed to be proved to which the document does, or probably may, refer; but if more evidence than this is admitted, if the Court may look at circumstances which affect the probability that the testator would form this intention or that, why should declarations of intention be excluded? If the question is, "What did the testator say?" why should the Court look at the circumstances that he lived with Charles, and was on bad terms with William? How can any amount of evidence to show that the testator intended to write "Charles" show that what he did write means "Charles"? To say that "Forster" means "Charles," is like saying that "two" means "three." If the question is "What did the testator wish?" why should the Court refuse to look at his declarations of intention? And what third question can be asked? The only one which can be suggested is, "What would the testator have meant if he had deliberately used unmeaning words?" The only answer to this would be, he would have had no meaning, and would have said nothing, and his bequest should be *pro tanto* void.

NOTE XXXIV.

(TO ARTICLE 92.—EVIDENCE BY STRANGERS TO DOCUMENTS.)

See 2 Ph. Ev. 364; Star. 726; Taylor (from Greenleaf), ss. 1149, Phipson, 533. Various cases are quoted by these writers in support of the first part of the proposition in the article; but *R. v. Cheadle* is the only one which

appears to me to come quite up to it. They are all settlement cases.

NOTE XXXV.

(TO CHAPTER XIII.— PRODUCTION AND EFFECT OF EVIDENCE.)

In this and the following chapter many matters usually introduced into treatise on evidence are omitted, because they appear to belong either to the subject of pleading, or to different branches of Substantive Law. For instance, the rules as to the burden of proof of negative averments in criminal cases (1 Ph. Ev. 555, &c.; 3 Russ. on Cr. 400-403) belong rather to criminal procedure than to evidence. Again, in every branch of Substantive Law there are presumptions more or less numerous and important, which can be understood only in connection with those branches of the law. Such are the presumptions as to the ownership of property, as to consideration for a bill of exchange, as to many of the incidents of the contract of insurance. Passing over all these, I have embodied in Chapter XIV. those presumptions only which bear upon the proof of facts likely to be proved on a great variety of different occasions, and those estoppels only which arise out of matters of fact, as distinguished from those which arise upon deeds or judgments.

NOTE XXXVI.

(TO ARTICLE 94.—PRESUMPTION OF INNOCENCE.)

The presumption of innocence belongs principally to the Criminal Law, though it has, as the illustrations show, a bearing on the proof of ordinary facts. The question, "What doubts are reasonable in criminal cases?" belongs to the Criminal Law.

NOTE XXXVII.

(TO ARTICLE 101.—"OMNIA RITE ACTA.")

The first part of this article is meant to give the effect of the presumption, *omnia esse rite acta*, 1 Ph. Ev. 480, &c.; Taylor, ss. 139, &c.; Best, s. 353, &c. This, like all presumptions, is a very vague and fluid rule at best, and is applied to a great variety of different subject-matters.

NOTE XXXVIII.

(TO ARTICLES 102-105.—ESTOPPELS IN PAIS.)

These articles embody the principal cases of estoppels *in pais*, as distinguished from estoppels by deed and by record. As they may be applied in a great variety of ways and to infinitely various circumstances, the application of these rules has involved a good deal of detail. The rules themselves appear clearly enough on a careful examination of the cases. The latest and most extensive collection of cases is to be seen in 2 S. L. C. 808-40, where the cases referred

to in the text and many others are abstracted. See, too, 1 Ph. Ev. 350-3; Taylor, ss. 101-3, 776, 778; Best, s. 543; Phipson, 584-8.

Article 102 contains the rule in *Pickard v. Sears*, 1837, 6 A. & E. at p. 474, as interpreted and limited by Parke, B., in *Freeman v. Cooke*, 1848, 2 Ex. 654, 663. The second paragraph of the article is founded on the application of this rule to the case of a negligent act causing fraud. The rule, as expressed, is collected from a comparison of the following cases: *Bank of Ireland v. Evans*, 1855, 5 H. L. Ca. 389; *Swan v. North British Australasian Company*, which was before three Courts, see 1859, 7 C. B. (N.S), 400; 1862, 7 H. & N. 603; 1863, 2 H. & C. 175, where the judgment of the majority of the Court of Exchequer was reversed; and *Halifax Guardians v. Wheelwright*, 1875, L. R. 10 Ex. 183, in which all the cases are referred to. All of these refer to *Young v. Grote*, 1827, 4 Bing. 253, and its authority has always been upheld, though not always on the same ground. The rules on this subject are stated in general terms in *Carr v. L. & N. W. Railway*, 1875, 10 C. P. 316-17.

It would be difficult to find a better illustration of the gradual way in which the judges construct rules of evidence, as circumstances require it, than is afforded by a study of these cases.

NOTE XXXIX.

(To CHAPTER XV.—COMPETENCY OF WITNESSES.)

The law as to the competency of witnesses was formerly the most, or nearly the most, important and extensive branch of the Law of Evidence. Indeed, rules as to the incompetency of witnesses, as to the proof of documents, and as to the proof of some particular issues, are nearly the only rules of evidence treated of in the older authorities. Great part of Bentham's 'Rationale of Judicial Evidence' is directed to an exposure of the fundamentally erroneous nature of the theory upon which these rules were founded; and his attack upon them has met with a success so nearly complete that it has itself become obsolete. The history of the subject is to found in Mr. Best's work, book ii. part i. ch. ii. ss. 132-88. See, too, Taylor, s. 1342-1393, and R. N. P. 160-4. As to the old law, see 1 Ph. Ev. 5 *et seq.*, 104.

NOTE XL.

(To ARTICLE 107.—WHAT WITNESSES INCOMPETENT.)

The authorities for the first paragraph are given at great length in Best, ss. 146-65. See, too, Taylor, s. 1375; Phipson, 436-8. As to paragraph 2, see Best, s. 148; 1 Ph. Ev. 7; 2 Ph. Ev. 457; Taylor, s. 1376.

NOTE XLI.

(TO ARTICLE 108.—COMPETENCY IN CRIMINAL CASES.)

At Common Law the parties and their husbands and wives were incompetent in all cases. This incompetency was removed as to the parties in civil, but not in criminal cases, by 14 & 15 Vict. c. 99, s. 2; and as to their husbands and wives, by 16 & 17 Vict. c. 83, ss. 1, 2. But sect. 2 expressly reserved the Common Law as to criminal cases and proceedings instituted in consequence of adultery.

The words relating to adultery were repealed by 32 & 33 Vict. c. 68, s. 3, which is the authority for Article 109.

Persons interested and persons who had been convicted of certain crimes were also incompetent witnesses, but their incompetency was removed by 6 & 7 Vict. c. 85.

Various modern statutes mentioned in Note 1, p. 289, made an accused person and his or her wife or husband competent witnesses in various cases, and now the Criminal Evidence Act, 1898, has removed their incompetency to the extent mentioned in the text. The law on the subject cannot, however, be correctly stated without reference to the old Common Law Rule.

NOTE XLII.

(TO ARTICLE 111.—PRIVILEGE OF JUDGES AND WITNESSES.)

The cases on which these articles are founded are only *Nisi Prius* decisions: but as they are quoted by writers of

eminence (1 Ph. Ev. 139; Taylor, s. 938), I have referred to them.

In the trial of Lord Thanet, for an attempt to rescue Arthur O'Connor, Serjeant Shepherd, one of the special commissioners, before whom the riot took place in court at Maidstone, gave evidence, *R. v. Lord Thanet*, 1799, 27 S. T. at p. 836.

I have myself been called as a witness on a trial for perjury to prove what was said before me when sitting as an arbitrator. The trial took place before Mr. Justice Hayes at York, in 1869. See, however, Article 123B.

As to the case of an advocate giving evidence in the course of a trial in which he is professionally engaged, see several cases cited and discussed in Best, ss. 184-6.

In addition to those cases, reference may be made to the trial of Horne Tooke for a libel in 1777, when he proposed to call the Attorney-General (Lord Thurlow), 20 S. T. at p. 740. These cases do not appear to show more than that, as a rule, it is for obvious reasons improper that those who conduct a case as advocates should be called as witnesses in it. Cases, however, might occur in which it might be absolutely necessary to do so. For instance, a solicitor engaged as an advocate might, not at all improbably, be the attesting witness to a deed or will.

NOTE XLIII.

(TO ARTICLE 115.—PROFESSIONAL COMMUNICATIONS.)

This article sums up the rule as to professional communications, every part of which is explained at great length,

and to much the same effect, 1 Ph. Ev. 105-122; Taylor, ss. 911-18A; Best, s. 581. See, too, Phipson, 181-91. It is so well established and so plain in itself that it requires only negative illustrations. It is stated at length by Lord Brougham in *Greenough v. Gaskell*, 1833, 1 M. & K. 98. The last leading case on the subject is *R. v. Cox and Railton*, 1884, 14 Q. B. D. 153. *Leges Henrici Primi*, v. 17: "Caveat sacerdos ne de hiis qui ei confitentur peccata alicui recitet quod ei confessus est, non propinquis, non extraneis. Quod si fecerit deponetur et omnibus diebus vitæ suæ ignominiosus peregrinando pœniteat." 1 M. 508.

NOTE XLIV.

(TO ARTICLE 117.—PRIVILEGE OF CLERGYMEN AND PRIESTS.)

The question whether clergymen, and particularly whether Roman Catholic priests, can be compelled to disclose confessions made to them professionally, has never been solemnly decided in England, though it is stated by the text writers that they can. See 1 Ph. Ev. 109; Taylor, ss. 916-17; R. N. P. 171; Starkie, 40. The question is discussed at some length in Best, ss. 583-4; and a pamphlet was written to maintain the existence of the privilege by Mr. Baddeley in 1865. Mr. Best shows clearly that none of the decided cases are directly in point, except *Butler v. Moore*, 1802, MacNally, 253-4, and possibly *R. v. Sparkes*, which was cited by Garrow in arguing *Du Barré v. Livette* before Lord Kenyon, 1791, 1 Pea. 108. The report of his

argument is in these words: "The prisoner being a Papist, had made a confession before a Protestant clergyman of the crime for which he was indicted; and that confession was permitted to be given in evidence on the trial" (before Buller, J.), "and he was convicted and executed." The report is of no value, resting as it does on Peake's note of Garrow's statement of a case in which he was probably not personally concerned; and it does not appear how the objection was taken, or whether the matter was ever argued. Lord Kenyon, however, is said to have observed: "I should have paused before I admitted the evidence there admitted."

Mr. Baddeley's argument is in a few words, that the privilege must have been recognised when the Roman Catholic religion was established by law, and that it has never been taken away.

I think that the modern Law of Evidence is not so old as the Reformation, but has grown up by the practice of the Courts, and by decisions in the course of the last two centuries. It came into existence at a time when exceptions in favour of auricular confessions to Roman Catholic priests were not likely to be made. The general rule is that every person must testify to what he knows. An exception to the general rule has been established in regard to legal advisers, but there is nothing to show that it extends to clergymen, and it is usually so stated as not to include them. This is the ground on which the Irish Master of the Rolls (Sir Michael Smith) decided the case of *Butler v. Moore, supra*. It was a demurrer to a rule to

administer interrogatories to a Roman Catholic priest as to matter which he said he knew, if at all, professionally only. The judge said, "It was the undoubted legal constitutional right of every subject of the realm who has a cause depending, to call upon a fellow-subject to testify what he may know of the matters in issue; and every man is bound to make the discovery, unless specially exempted and protected by law. It was candidly admitted that no special exemption could be shown in the present instance, and analogous cases and principles alone were relied upon." The analogy, however, was not considered sufficiently strong.

Several judges have, for obvious reasons, expressed the strongest disinclination to compel such a disclosure. Thus Best, C.J., said, "I, for one, will never compel a clergyman to disclose communications made to him by a prisoner; but if he chooses to disclose them I shall receive them in evidence" (*obiter*, in *Broad v. Pitt*, 1828, 3 C. & P. 518). Alderson, B., thought (rather it would seem as a matter of good feeling than as a matter of positive law) that such evidence should not be given. *R. v. Griffin*, 1853, 6 Cox, Cr. Ca. 219.

NOTE XLIV_A.

(TO ARTICLE 123_A.—UNSWORN EVIDENCE,
RELEVANCY OF.)

In *R. v. Wealand*, 1888, 20 Q. B. D. 827, the indictment, under the Criminal Law Amendment Act, s. 4, charged the prisoner with carnally knowing a girl under

13. The child, under the same section, gave evidence without being sworn. The jury acquitted the prisoner of carnally knowing the child, and found him guilty of indecent assault. The conviction was affirmed, though on a charge of indecent assault the unsworn evidence would have been inadmissible, and though the evidence apart from the child's statement was insufficient to support a conviction. The ground of the decision was that sect. 4 of the Act made the unsworn evidence admissible, and sect. 9 made the verdict lawful. Lord Coleridge, C.J., described the result as "an anomaly," and as showing "an unsatisfactory state of the law." In *R. v. Paul*, 1890, 25 Q. B. D. 202, the indictment was in two counts, one under sect. 4 of the Criminal Law Amendment Act, 1885, charging an attempt to have carnal knowledge of a girl under thirteen, and the other charging indecent assault. Under sect. 4 the child gave evidence without being sworn. The other evidence was insufficient to support a conviction, but contributed material corroboration of the unsworn statement. The jury acquitted the prisoner (by the direction of the judge) on the first count, and found him guilty, on the second, of indecent assault. The conviction was quashed on the ground that, on the substantial count for indecent assault, not being a charge under s. 4 of the Criminal Law Amendment Act, the unsworn evidence of the child was inadmissible. The judgment of the Court (delivered by Hawkins, J., and concurred in by Lord Coleridge, C.J., and Mathew, Day, and Grantham, JJ.) distinguished *R. v. Wealand* on the ground that there

the verdict was returned, as by law it could be, upon a count (under s. 4) upon which the unsworn evidence was admissible. In this judgment "the law created by the Statute" was said to be "in a very unsatisfactory state." It is clear that the two cases cannot be reconciled upon a satisfactory principle, and that, both being authoritative, the admissibility of the unsworn evidence depends in such cases upon the form of the indictment. It is to be observed that since the passing of the Prevention of Cruelty to Children Act, 1894, (57 & 58 Vict. c. 41, s. 15, & Schedule), if the indecent assault were an "offence involving bodily injury" to the child, it might be argued that the unsworn statement of the child was admissible, not under the Criminal Law Amendment Act, 1885, but under the Prevention of Cruelty to Children Act. It seems probable, however, that the words "offence involving bodily injury" mean an offence necessarily involving bodily injury, which indecent assault could hardly be said to be. If an indictment for having carnal knowledge of a girl under thirteen in one count were so drawn as to comprise — as it very well might — an allegation that the prisoner indecently assaulted the child, it would seem that *R. v. Wealand* would make the child's unsworn testimony admissible, and that in the event of a conviction for indecent assault *R. v. Paul* would not apply.

NOTE XLV.

(TO ARTICLES 126, 127, 128.—EXAMINATION, ETC., OF WITNESSES.)

These articles relate to matters almost too familiar to require authority, as no one can watch the proceedings of any Court of Justice without seeing the rules laid down in them continually enforced. The subject is discussed at length in 2 Ph. Ev. pt. 2, chap. x. p. 456, &c.; Taylor, s. 1394, &c.; Phipson, 467-80; see, too, Best, s. 631, &c. In respect to leading questions, it is said, "It is entirely a question for the presiding judge whether or not the examination is being conducted fairly." R. N. P. 165.

NOTE XLVI.

(TO ARTICLE 129.—LIMITS OF CROSS-EXAMINATION.)

This article states a practice which is now common, and which never was more strikingly illustrated than in the case referred to in the illustration. But the practice which it represents is modern; and I submit that it requires the qualification suggested in the text. I shall not believe, unless and until it is so decided upon solemn argument, that by the law of England a person who is called to prove a minor fact, not really disputed, in a case of little importance, thereby exposes himself to having every transaction of his past life, however private, inquired into by persons

who may wish to serve the basest purposes of fraud or revenge by doing so. Suppose, for instance, a medical man were called to prove the fact that a slight wound had been inflicted, and had been attended to by him, would it be lawful, under pretence of testing his credit, to compel him to answer upon oath a series of questions as to his private affairs, extending over many years, and tending to expose transactions of the most delicate and secret kind, in which the fortune and character of other persons might be involved? If this is the law, it should be altered. The following section of the Indian Evidence Act (1 of 872) may perhaps be deserving of consideration. After authorising, in sect. 147, questions as to the credit of the witness the Act proceeds as follows in sect. 148:—

“If any such question relates to a matter not relevant to the suit or proceeding, except so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if he thinks fit, warn the witness that he is not obliged to answer it. In exercising this discretion, the Court shall have regard to the following considerations:—

“(1) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

“(2) Such questions are improper if the imputation which they convey relates to matters so remote in time or

of such a character that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

“(3) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness’s character and the importance of his evidence.”

Order XXXVI., rule 38, expressly gives the judge a discretion which was much wanted, and which I believe he always possessed.

NOTE XLVII.

(TO ARTICLE 131.—STATEMENTS INCONSISTENT WITH PRESENT TESTIMONY.)

The contents of this section are intended to represent sects. 3 and 4 of the Criminal Procedure Act, 1865, 28 & 29 Vict. c. 18, which re-enacted sects. 22 and 23 of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, now repealed by the Statute Law Revision Act, 1892. The two sections in question are as follows:—

3. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to des-

ignite the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

4. If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

The sections are obviously ill-arranged; but apart from this, s. 3 is so worded as to suggest a doubt whether a party to an action has a right to contradict a witness called by himself whose testimony is adverse to his interests. The words "he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence," suggest that he cannot do so unless the judge is of that opinion. This is not, and never was, the law. In *Greenough v. Eccles*, 1859, 5 C. B. (N.S.), at p. 802, Williams, J., says; "The law was clear that you might not discredit your own witness by general evidence of bad character; but you might, nevertheless, contradict him by other evidence relevant to the issue;" and he adds, at p. 803: "It is impossible to suppose that the Legislature could have really intended to impose any fetter whatever on the right of a party to contradict his own witness by other evi-

dence relevant to the issue—a right not only established by authority, but founded on the plainest good sense.”

Cockburn, L.C.J., in the same case, at p. 806, said of the 22nd section of the Common Law Procedure Act, 1854: “There has been a great blunder in the drawing of it, and on the part of those who adopted it. . . . Perhaps the better course is to consider the second branch of the section as altogether superfluous and useless (p. 806).” On this authority I have omitted it.

For many years before the Common Law Procedure Act of 1854 it was held, in accordance with *Queen Caroline’s Case*, 1820, 2 Br. & Bing. 286-91, that a witness could not be cross-examined as to statements made in writing, unless the writing had been first proved. The effect of this rule in criminal cases was that a witness could not be cross-examined as to what he had said before the magistrates without putting in his deposition, and this gave the prosecuting counsel the reply. Upon this subject rules of practice were issued by the judges in 1837, when the *Prisoner’s Counsel Act* came into operation. The rules are published in 7 C. & P. 676. They would appear to have been superseded by the 28 Vict. c. 18.

NOTE XLVIII.

The Statute Law relating to the subject of evidence may be regarded either as voluminous or not, according to the view taken of the extent of the subject.

The number of statutes classified under the head “Evidence” in *Chitty’s Statutes* is 30. The number referred

to under that head in the Index to the Revised Statutes is 68. Many of these, however, relate only to the proof of particular documents, or matters of fact which may become material under special circumstances.

Of these I have noticed a few, which, for various reasons, appear important. Such are: 34 & 35 Vict. c. 112, s. 19 (see Article 11); 9 Geo. IV. c. 14, s. 1, amended by 19 & 20 Vict. c. 97, s. 13 (see Article 17); 9 Geo. IV. c. 14, s. 3; 3 & 4 Will. IV. c. 42 (see Article 28); 41 & 42 Vict. c. 11 (Article 36); 7 & 8 Geo. IV. c. 28, s. 11, amended by 6 & 7 William IV. c. 111; 24 & 25 Vict. c. 96, s. 116; 24 & 25 Vict. c. 99, s. 37; 61 & 62 Vict. c. 36, s. 1 (6) (see Article 56); 61 & 62 Vict. c. 36, s. 1 (Article 108); 8 & 9 Vict. c. 10, s. 6; 48 & 49 Vict. c. 69, s. 4 (Article 121); 7 & 8 Will. III. c. 3, ss. 2-4; 39 & 40 Geo. III. c. 93 (Article 122); 11 & 12 Vict. c. 42, s. 17 (Article 140); 30 & 31 Vict. c. 35, s. 6 (Article 141); 53 & 54 Vict. c. 37, s. 6 (Article 141A); 57 & 58 Vict. c. 41, ss. 13, 14 (Article 141B); 57 & 58 Vict. c. 60, s. 691 (Article 142).

Many, again, refer to pleading and practice rather than evidence, in the sense in which I employ the word. Such are the Acts which enable evidence to be taken on commission if a witness is abroad, or relate to the administration of interrogatories.

Those which relate directly to the subject of evidence as defined in the Introduction, are the eleven following Acts:—

1.

46 *Geo. III*, c. 37 (1 section; see Article 120). This Act qualifies the rule that a witness is not bound to answer questions which criminate himself by declaring that he is not excused from answering questions which fix him with a civil liability.

2.

6 & 7 *Vict. c.* 85. This Act abolishes incompetency from interest or crime (4 sections; see Article 106).

3.

8 & 9 *Vict. c.* 113: "An Act to facilitate the admission in evidence of certain official and other documents" (8th August, 1845; 7 sections).

S. 1. after preamble reciting that many documents are, by various Acts, rendered admissible in proof of certain particulars if authenticated in a certain way, enacts *inter alia* that proof that they were so authenticated shall not be required if they purport to be so authenticated. (Article 79.)

S. 2. Judicial notice to be taken of signatures of certain judges. (Article 58, latter part of clause 8.)

S. 5. Certain Acts of Parliament, proclamations, &c., may be proved by copies purporting to be Queen's printers' copies. (Article 81.)

S. 4. Penalty for forgery, &c. This is omitted as belonging to the Criminal Law.

4.

14 & 15 *Vict. c. 99*: "The Evidence Act, 1851" (7th August, 1851; 20 sections):—

S. 2 makes parties admissible witnesses, except in certain cases. (Effect given in Articles 106 & 108.)

S. 3. Persons accused of crime, and their husbands and wives, not to be competent. Implicitly repealed by the Criminal Evidence Act, 1898. (Article 108.)

S. 4. The first three sections not to apply to proceedings instituted in consequence of adultery. Repealed by 32 & 33 *Vict. c. 68*. (Effect of repeal, and of s. 3 of the last-named Act, given in Article 109.)

S. 5. None of the sections above mentioned to affect the Wills Act of 1838, 7 *Will. IV. & 1 Vict. c. 26*. (Omitted as part of the Laws of Wills.)

S. 6. The Common Law Courts authorised to grant inspection of documents. (Omitted as part of the Law of Civil Procedure.)

S. 7. Mode of proving proclamations, treaties, &c. (Article 84.)

S. 8. Proof of qualification of apothecaries. (Omitted from the text as part of the law relating to medical men.)

Ss. 9, 10, 11. Documents admissible either in England or in Ireland, or in the colonies, without proof of seal, &c., admissible in all. (Article 80.)

S. 13. Proof of previous convictions. (Omitted from the text as belonging to Criminal Procedure.)

S. 14. Certain documents provable by examined copies

or copies purporting to be duly certified. (Article 79, last paragraph.)

S. 15. Certifying false documents a misdemeanour. (Omitted as belonging to Criminal Law.)

S. 16. Who may administer oaths. (Article 124.)

S. 17. Penalties for forging certain documents. (Omitted as belonging to the Criminal Law.)

S. 18. Act not to extend to Scotland. (Omitted.)

S. 19. Meaning of the word "Colony." (Article 80, note 1.)

5.

28 & 29 *Vict. c. 18*: "The Criminal Procedure Act,² 1865" (9th May, 1865, 10 sections). This Act re-enacts ss. 22-27 of the Common Law Procedure Act, 1854, which are now repealed by the Statute Law Revision Act, 1892.

S. 1. Sects. 3-8 to apply to all courts and causes, criminal as well as civil.

S. 2. Summing up of evidence in criminal cases. (Omitted as being procedure.)

S. 3. How far a party may discredit his own witnesses. (Articles 131, 133, and see Note XLVII.)

S. 4. Proof of contradictory statements by a witness under cross-examination. (Article 131.)

S. 5. Cross-examination as to previous statements in writing. (Article 132.)

² This is the title given to the Act by the Short Titles Act, 1896; it seems to be based exclusively on sect. 2 of the Act.

S. 6. Proof of previous conviction of a witness may be given. (Article 130 (1).)

S. 7. Attesting witnesses need not be called unless writing requires attestation by law. (Article 69.)

S. 8. Comparison of disputed handwriting. (Articles 49 and 52.)

6.

31 & 32 *Vict. c. 37* (25th June, 1868, 6 sections):—

S. 1. Short title. “The Documentary Evidence Act,” 1868.

S. 2. Certain documents may be proved in particular ways. (Article 83, and for schedule referred to, see note to the article.)

S. 3. The Act to be in force in the colonies. (Article 83.)

S. 4. Punishment of forgery. (Omitted as forming part of the Criminal Law.)

S. 5. Interpretation clauses embodied (where necessary) in Article 83.

S. 6. Act to be cumulative in Common Law. (Implied in Article 73.)

7.

32 & 33 *Vict. c. 68* (9th August, 1869, 6 sections):—

S. 1. Repeals part of 14 & 15 *Vict. c. 99*, s. 4, and part of 16 & 17 *Vict. c. 83*, s. 2. (The effect of this repeal is given in Article 109; and see Note XLI.)

S. 2. Parties competent in actions for breach of promise of marriage, but must be corroborated. (See Articles 106 and 121.)

S. 3. Husbands and wives competent in proceedings in consequence of adultery, but not to be compelled to answer certain questions. (Article 109.)

S. 4. Atheists rendered competent witnesses. (Repealed by Oaths Act, 1888.)

S. 5. Short title: "The Evidence further Amendment Act, 1869."

S. 6. Act does not extend to Scotland.

8.

48 & 49 *Vict. c. 69*: "The Criminal Law Amendment Act, 1885" (20 sections).

S. 4. Unsworn evidence of a child admitted in cases of defilement of a girl under thirteen; but corroboration needed. (Article 123A.)

9.

51 & 52 *Vict. c. 46*: "The Oaths Act, 1888" (24th Dec., 1888; 7 sections).

S. 1. A person objecting to be sworn may make an affirmation. (Article 123.)

S. 2. Form of affirmation.

S. 3. Oath valid, though no religious belief. (Article 123.)

S. 4. Form of written affirmation

S. 5. Swearing as in Scotland. (Article 124.)

S. 6. Repeals.

S. 7. Short title.

10.

57 & 58 *Vict. c. 41*: "The Prevention of Cruelty to Children Act," 1894 (28 sections).

S. 15. Unsworn evidence of a child admitted in cases of cruelty to children, etc.; but corroboration needed. (Article 123A.)

11.

61 & 62 *Vict. c. 36*: "The Criminal Evidence Act, 1898" (7 sections).

S. 1. Person charged with offence, and their wife or husband competent witness. (Article 108.)

S. 2. When such person is called. (Omitted as procedure.)

S. 3. Right of reply. (Omitted as procedure.)

S. 4. When husband or wife a compellable witness. (Article 108.)

SS. 5, 6, 7. Application of the Article to Scotland, Ireland. Courts-martial, etc.

These are the only Acts which deal with the Law of Evidence as I have defined it. It will be observed that they relate to three subjects only—the competency of witnesses, the proof of certain classes of documents, and certain details in the practice of examining witnesses. Thus, when the Statute Law upon the subject of Evidence is sifted and put in its proper place as part of the general system, it appears to occupy a very subordinate position in it. The eleven statutes above mentioned are the only ones which really form part of the Law of Evidence, and their effect is fully given in twenty-two³ articles of the Digest, some of which contain other matter besides.

³ 49, 52, 58, 69, 79, 80, 81, 83, 84, 106, 108, 109, 120, 121, 123, 123A, 124, 125, 130, 131, 132, 133.

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